

UNIVERSITY OF PENNSYLVANIA

THE FLEXIBLE PROVISIONS IN THE
UNITED STATES' TARIFF, 1922-1930

J. MARSHALL GERSTING

A THESIS
IN ECONOMICS

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

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ACKNOWLEDGMENTS

The writer wishes to acknowledge his indebtedness to the many persons who so generously assisted him in the preparation of his manuscript. Especially, he wishes to thank Professors Grover G. Huebner, Harry T. Collings, G. Wright Hoffman, Wendell Phillips Raine, and Karl W. H. Sholz, all of the University of Pennsylvania.

He also wishes to thank Mrs. Elizabeth Frank, Miss Betty Lou Wright, and Mr. Frank Wilson for their help in proof-reading the manuscript and Mrs. Lucy Williams for typing the manuscript.

J. MARSHALL GERSTING.

Philadelphia, Pa.
August, 1932.



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I

INTRODUCTION

Flexibility, not unlike Robert Louis Stevenson's famous character, implies duality. With specific reference to the tariff, flexibility would mean not only its ability to be expanded to meet the requirements of changing conditions, but its ability, as well, to be contracted.

Intermittent American Tariff Flexibility Prior to 1922

There is a general belief that flexibility was not characteristic of the American tariff, prior to the passage of the Act of 1922. However, a survey of the tariff acts of the United States over a period of a hundred and fifty years furnishes an example of a certain kind of tariff flexibility. The first act of the new Congress of the United States in July of 1789 was a tariff act. The rates, largely ad valorem, set by that act were the lowest ever set in any American tariff act and averaged a little over eight per cent. It was avowedly a protective tariff measure but the low average rate hardly substantiated the claim.

Following 1789 came successively the Napoleonic Wars and the War of 1812. Both of these events served to reduce the foreign trade of the United States with the resultant expansion of domestic production. The Treaty of Vienna in 1815 found England, among the other European countries, with large surpluses of manufactured goods. The United States was an attractive market in which to dispose of them and action was accordingly taken by England and the continental countries. As a result of the flooding of the American market with those surpluses, prices fell and a wave of enthusiasm for a high protective tariff spread throughout the country. The tangible result was the Act of 1816, which established the so-called "American System" of tariff protection. The average rate of duty in that act was twenty per cent which was more than double the average protection afforded by the Act of 1789.

The next influencing event in the United States, the panic

of 1819, led to the Tariff Act of 1820 in which rates were raised still further. Four years later, the duties were again raised with the result that the average rate stood at a little over thirty-three per cent. Another four years passed and in 1828 the so-called "Tariff of Abominations" saw the average of duties increased to over forty per cent, the high-water mark of protection up to that time.

In 1833, Henry Clay, representing the protectionist group in Congress and John Calhoun, representing the free-trade South, came to an agreement and the Compromise Tariff was passed. It provided for a gradual stepping down of duties so that by July 1, 1842, all duties were to be reduced to twenty per cent of the amount they had been when the act was passed. That tariff has been called "The Nine Year Lease of Protection." The elaborate operations of reducing duties were completed in July of 1842, but, by coincidence, at that time the government was in need of funds and a new tariff act was passed which increased the rates of duty.

The following twenty-two years witnessed the passage of two tariff acts, in 1846 and 1857, both of which decreased the protective duties. However, with the occurrence of the Civil War, the need for larger revenues led to the passage of the Act of 1864, which raised the level of protection to forty-seven per cent. In 1883, the next general tariff revision was effected and this was followed by the McKinley Act in 1890, which further increased the average level of duties to approximately fifty per cent. The Wilson Act in 1894 lowered the average to thirty-nine per cent, but the Dingley Act, three years later sent the average level to its all-time high point of fifty-seven per cent.

The Dingley Act remained in force longer than any previous tariff act and it was not replaced until 1909, when the Payne-Aldrich Act again increased the level of protection. The Underwood Act was passed on the eve of the World War, in 1913, and lowered duties to an average of thirty per cent. The Emergency Tariff Act of 1921 raised duties especially on agricultural products and was a temporary measure pending the passage of a general tariff act in 1922 which provided another high-water mark of protection.

Thus, it is seen that the American tariff acts increased the amount of protection given to the producers of the country during the early years of independence in order to facilitate the development of the country. From 1846 down to the Civil War, the degree of protection was steadily diminished as the country prospered and grew rich. Following the advent of the Civil War, the average of duties was pushed progressively upward, with the two exceptions of 1894 and 1913, until the all-time peak of protection was reached in 1922. Generally speaking, therefore, the American tariffs have shown a type of flexibility in that the rates were changed from time to time apparently in accordance with the demands of the country. However, in the midst of such legislation stands the fact that the American tariff prior to 1922 was not flexible in any real sense of the word. It was flexible in that changes were made in the schedules of rates by Congress at more or less regular intervals, but, between the general tariff revisions, the tariff structure was decidedly inflexible in that no changes could be made until Congress again undertook a complete revision, except in the following special situations.

Continuous American Tariff Flexibility Prior to 1922

Prior to 1922, it had been possible to change the tariff rates set by Congress without its action, provided the existence of either or both of two outlawed practices could be unquestionably established. Those two practices were unfair methods of importing and discriminating against American trade abroad.

Unfair Acts in Importing

Concerning the first of these, the Sherman Anti-Trust Act of 1890 provided that every contract, combination, or conspiracy in restraint of trade among the several States or with foreign nations was illegal.¹ Section 73 of the Tariff Act of 1894 made the Sherman Act provision definitely applicable to those

¹ *Supplement to the Revised Statutes of the U. S.* (Government Printing Office, Washington, 1891), Second Edition: Revised and Continued, 1874-1891, Vol. 1, p. 762 ff.

engaged in importing if the effect of the combination, agreement, or contract would be to restrain trade or free competition or increase the market price in any part of the United States of the article or articles imported or intended to be imported or of any manufacture into which such imported articles entered or were intended to enter.²

The Revenue Act of 1916 declared unfair competition in the import trade a misdemeanor, and provided a fine or a jail sentence or both for those convicted of that charge. The Act rather elaborately defined unfair competition.³

In Title II of the Emergency Tariff Act of 1921, the Secretary of the Treasury was given power to determine whether or not goods were being unfairly imported. Upon proof that they were, he was directed to levy a duty additional to the one contained in the act in an amount equal to the difference between the purchase price or the exporter's sale price and the foreign market value or in the absence of such value, then the cost of production.⁴

The Tariff Act of 1922, in section 316, continued that policy but transferred the power of deciding upon the extent of the violation to the President, who was to be aided in his investigations by the Tariff Commission. Furthermore, the President was not limited in the extent to which he could impose additional duties. Ordinarily, he was directed to impose additional duties of not less than ten nor more than fifty per cent of the rate contained in the act, but if he found the violation excessive, he was empowered to exclude the articles from entering the country.⁵

Discriminations

Turning to the question of discriminations against the foreign trade of the United States, four tariff acts previous to 1922 can be cited in this connection. Section 3 of the Act of 1890 pro-

² *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1895), Vol. XXVIII, p. 569.

³ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1917), Vol. XXXIX, Pt. 1, pp. 798 ff.

⁴ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1923), Vol. XLII, Pt. 1, pp. 11 ff.

⁵ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XLII, Pt. 1, p. 943 f.

vided that if the President were satisfied that any or all of the countries exporting sugars, molasses, coffee, tea, and hides were practicing discriminations against the agricultural or other products of the United States which he deemed reciprocally unequal or unreasonable in view of the free introduction of those products into the United States, he was to suspend the free entry of those products for such time as he deemed just. Then followed a detailed enumeration of the duties to be imposed by him during the continuance of the discriminations.⁶ The Tariff Act of 1894 repealed this section of the 1890 Act.⁷

Section 3 of the Act of 1897 empowered the President to enter into negotiations with the countries producing and exporting to the United States argols, spirits manufactured or distilled from grain, sparkling wines, still wines and vermouth, and paintings and statuary with a view to arranging commercial agreements providing for reciprocal and equivalent concessions for American exports. Upon completion of the agreements, the alternative duties specified by Congress were to be levied and collected so long as the President was satisfied the foreign governments were living up to the agreements. Tea, tonka beans, and vanilla were to be denied free entry into the United States if the President was convinced that any or all the countries exporting those products to the United States were imposing any reciprocally unfair exactions upon American commerce. The duties to be levied in such event were specified in the section.

Section 4 of the act provided for the making of treaties to secure reciprocal trade with foreign countries. They were to be made within two years from the passage of the act and were to last for not more than five years. The duties to prevail thenceforth were to be those set in the treaties, but no reduction was to be more than twenty per cent and no article was to be removed to the free list from the dutiable list unless it was a natural product of the foreign country and not of the United States.

Section 5 provided for the imposition of an additional duty upon all imports which had previously received, either directly

⁶ *Supplement to the Revised Statutes of the U. S., op. cit.*, Vol. 1, 1874-1891, pp. 856-857.

⁷ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XXVIII, p. 569.

or indirectly, a bounty or grant upon their exportation. The additional duty was to be equal in amount to the duty or grant.⁸

The Tariff Act of 1909 directed the termination of all agreements made under section 3 of the 1897 Act, and in section 2 set up the principle of a maximum-minimum tariff. The rates set in the act were to compose the minimum tariff. The maximum rates were to be the minimum rates plus an additional twenty-five per cent ad valorem, and those maximum rates were the ones ordinarily to prevail. When the President was satisfied that foreign countries granted treatment reciprocally equal to that afforded by the minimum tariff rates, and when those countries in no way discriminated against the foreign trade of the United States, he was to proclaim the admittance of imports from those countries under the terms of the minimum tariff. If the President became satisfied, later, that the conditions which led him to proclaim the minimum rates no longer existed, he was directed to proclaim such finding, and ninety days thereafter the maximum rates would again prevail.⁹

The Tariff Act of 1913 repealed section 2 of the 1909 Act, and provided in section IV A that the President was empowered to enter into trade agreements, subject to the approval of Congress, wherein mutual trade concessions could be made, looking toward freer trade relations.¹⁰

In the Revenue Act of 1916 appear three sections having to do with discriminations. The first one directed the Secretary of the Treasury to take the necessary steps in prohibiting the entry of either dutiable or non-dutiable imports from countries prohibiting the importation of the United States' products not injurious to health or morals. The second directed the President to prohibit or restrict importations from any country which during the existence of a war in which the United States was not engaged prevented or restricted importation from the United States not injurious to health or morals. Such prohibited or

⁸ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1899), Vol. XXX, pp. 203-205.

⁹ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1911), Vol. XXXVI, Pt. 1, p. 82 ff.

¹⁰ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1915), Vol. XXXVIII, Pt. 1, p. 192.

restricted entry was to continue until the discrimination had been removed. The third section made the provisions of the second section applicable to American ships and citizens.¹¹

In section 317 of the Act of 1922, the President was given power to levy additional duties of not less than ten per cent nor more than fifty per cent of those set in the act in the event he was convinced that some discrimination was being practiced against the foreign trade of the United States by a foreign country which was not being likewise practiced against the trade of any or all other countries by that country. If the discrimination continued in face of the additional duty, he was given the power to exclude the goods of the country until the discrimination was removed. As in the case of section 316, he was to be aided in the administration of section 317 by the Tariff Commission.¹²

In summary it can therefore be said that from the passage of the first act in 1789, the American tariff in general was characterized by intermittent flexibility in that revisions were made from time to time by Congress as the needful changes accumulated. In the interims between general revisions, the rates set by Congress could be changed in order to prevent unfair acts in importing and discriminations against the foreign trade of the United States. But changes of the latter sort were distinctly punitive in character. Furthermore, it was obvious that such penalizing duties would sooner or later be revoked upon cession of the acts that caused their infliction.

Section 315

In the 1922 Act, there is to be found an administrative section, distinctly different from sections 316 and 317 and differing also from the earlier punitive measures. That section is 315.

Before the World War, the United States did not greatly depend upon foreign trade. It enjoyed a seller's market for its products and being primarily an agricultural country, its imports were largely non-competitive in nature, so that the tariff rates set

¹¹ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XXXIX, Pt. 1, pp. 798-800.

¹² *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XLII, Pt. 1, pp. 944-946.

tended to remain, during relatively long periods of time, effective for its purposes, especially since the United States as well as the rest of the world was relatively stable, economically speaking. But with the World War all normal conditions vanished. New trade channels were opened up to the United States and new fields of production were entered because of the temporary cessation of a large part of Europe's trade and production. With the coming of peace in 1918, the world economic situation was distorted. Close upon the Treaty of Versailles a speculative boom followed, characterized among other things by a depreciation of European currencies and a terrific struggle for world markets. In 1922, therefore, it was not surprising that Congress felt that the tariff rates set by it would not long remain effective. To provide for future possibilities in that direction, it passed an act which contained a section new to American tariff legislation, one which was to provide for a continuous flexibility for all tariff rates.

The tariff is of such vital importance to the United States that an innovation such as was contained in the 1922 Act could not fail to arrest national and international attention. In its political aspect, the tariff is of importance to the government as a means of securing revenue. But the political aspect of the American tariff, in that respect, was overshadowed as far back as 1816 when, with the establishment of protection, its economic aspect came into ascendancy. As such, the tariff has almost innumerable ramifications. It affects domestic production and thus domestic and world price levels. It affects international trade and the extent to which the division of labor shall be carried.

The Flexible Section

Section 315 has no antecedent in American tariff legislation. For the first time in history, by the terms of that section, the President of the United States was given the power to raise or lower the rates set in the act in order to equalize foreign and domestic costs of production. It thus provided for flexibility in the full sense of the word. The changes made under the section were not to be temporary or punitive. They were to

continue until such later time when further changes in domestic or foreign costs of production occasioned further changes in the rates.

Since this section does not have any American counterpart and since it established, by its terms, initial and general flexibility for American tariff rates, a study of it seems opportune. At the time the Act of 1922 was passed, the flexible section was claimed to be a device whereby the tariff would be taken out of politics and would be made scientific. Even mild success in accomplishing either or both of these objectives would serve to distinguish the Act of 1922 from all its predecessors. With such high hopes forecast for the flexible section and with such a pronouncement coming to a country and a world upset in almost every phase of its economic life, the establishment and administration of section 315 became of paramount interest. Perhaps the United States had found the satisfactory method of dealing with a country's tariff structure.

In one subdivision of the section, a provision was made for change to the American valuation basis if the maximum duty increases provided for, on the prevailing foreign valuation basis did not accomplish equalization of foreign and domestic costs of production. Thereby, the whole question of valuation bases became interwoven with the flexible arrangement. A consideration of that problem logically should precede an examination of the other provisions of the section.

In order to have a better understanding of the flexible section, a brief survey of its congressional evolution is desirable. Carefully as the section was evolved by Congress, such an important delegation of power by that body to the Tariff Commission was not without its constitutional aspect. In 1925, however, a Supreme Court decision decided the issue and upheld the constitutionality of the section.

The Tariff Commission was given the power, in another part of the section, to make all needful rules and regulations governing procedure under the section. An examination of those leads naturally to a study of the section in operation.

In June of 1930, section 315 was superseded by a new flexible section, section 336. In view of the difficulties experienced

in the administration of section 315, it is interesting to note the changes made by Congress in section 336 to improve the flexible arrangement.

As a result of the study of sections 315 and 336, in text and in practice, a basis is furnished for a critical evaluation of the flexible tariff concept. Answers are to be found for the questions of whether or not the tariff has been taken out of politics and has been made scientific.

II

AMERICAN VALUATION

Early Examples of American Valuation In United States Tariff Legislation

In determining the origin of the American valuation idea in United States tariff legislation, it is interesting to note that it first appeared in the initial tariff act passed by Congress. In the Act of 1789, a 5 per cent ad valorem duty was imposed upon unenumerated merchandise at the time and place of importation. This dutiable value was to be arrived at by adding 20 per cent to the actual cost thereof, if the imports originated at the Cape of Good Hope, or beyond, and 10 per cent if they came from any other place or country.¹

This practice of domestic or American valuation for the computation of ad valorem duties lasted for only six years, as the Act of 1795 made the dutiable base "the actual cost at the place of exportation."²

This foreign valuation basis was continued until the passage of the Act of 1833, which provided that duties were to be assessed upon the value thereof at the port where they were entered.³

This provision, however, did not go into effect until June 10, 1842, since the Act of 1833 had extended the life of the Act of 1832 until that date. And it remained in effect for only two months, as the Act of August 30, 1842, provided that duties were to be assessed upon the actual market value or wholesale price at the time when purchased in the principal markets of the country from which they were imported into the United States.⁴

At various intervals following the passage of this Act, especially in 1909, 1913, 1920, and 1921, attempts were made to change the dutiable base to American valuation, but without success. Thus, prior to the tariff revision in 1921-1922, American valua-

¹ U. S. Tariff Commission, *Dictionary of Tariff Information*, (Government Printing Office, Washington, 1923), p. 282.

² *Ibid.* p. 282.

³ *H. Doc.* 61st Cong. 2nd Sess., Vol. 129, p. 110.

⁴ *Ibid.*, p. 135.

tion had been in actual operation for only the two months from June 30 to August 30, 1842, if its limited application under the terms of the first act is disregarded.

American Valuation in the Fordney Bill of 1921

From January 6 to February 16, 1921, the Committee on Ways and Means of the House held hearings upon prospective changes in the existing tariff act. In the course of those hearings, among other things, the question of American valuation was considered. The plan was condemned by some and favored by others.

Those opposed to the plan argued that it was impracticable, and that its adoption would mean the overthrow of the policy followed by the United States since its beginning. That would mean, in turn, the virtual discarding of over a hundred years accumulation of Customs data and court decisions and interpretations, all of which were based upon the practice of foreign valuation.⁵ They further argued that it would place the tariff, practically speaking, in the hands of business interests in the country. These could conceivably regulate production at home, and so determine prices which in turn would stand as the dutiable basis under the American valuation plan.⁶

Undervaluation, which was so strongly emphasized by those in favor of the plan, was held to amount to only one-tenth of one per cent. The investigation of the Port of New York made by the Merchants' Association of New York was referred to in this connection.⁷

Furthermore, it was held that the plan would turn, potentially, every importer into a gambler with the government as his partner. Such importers would be tempted to try to manipulate the domestic market between the date of their purchases abroad, and the date of the arrival of the goods in the United States. Any decrease in price between the two dates would benefit the importers to that extent, with duties levied upon an American

⁵ *Hearings on General Tariff Revision before the Committee on Ways and Means*, 66th Cong. 3rd Sess., Pt. IV, p. 4182.

⁶ *Ibid.*

⁷ *Ibid.*

value basis.⁸ The conceivable situation was pictured wherein the importer, anticipating his needs, might enter goods into Canada, for example, and place them in a bonded warehouse with subsequent withdrawal and exportation to the United States when the current selling price was depressed here.⁹

Another point stressed in favor of foreign valuation was that such values were usually well defined in the important center of foreign production, whereas, in the United States, that was held to be the exception rather than the rule for imported products.¹⁰ It was further pointed out that under American valuation, future buying would be practically rendered impossible, since the amount of duty payable at the future date of importation could only be roughly approximated at the time the future contracts were entered into.¹¹ The argument that American valuation would effectively deal with the problem of depreciated foreign exchanges was discounted by those opposed to the plan. They countered this argument by declaring that price levels abroad had risen by approximately the same amount that exchange rates had fallen. Therefore, the continued use of foreign valuation would not decrease the amount of duty revenue for that reason.¹²

The final point of the opposition was in the form of a challenge. Would it be possible, in every case, to find a comparable and competitive American product? If none could be found, then, presumably, the foreign value would be taken and worked back to the United States by adding transportation charges, commissions, and profits, among other things, in order to find the dutiable value. This, it was claimed, would involve much more work than the use of the foreign valuation basis.¹³

Those in favor of the plan believed that, while a change from foreign to American valuation would require considerable adjustment of government machinery, such adjustment was not

⁸ *Hearings, op. cit.*, p. 4208.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 4208.

¹² *Ibid.*, p. 4209.

¹³ *Ibid.*, pp. 4210-4236.

impossible of achievement.¹⁴ They, also, believed that the final adjustment of duties could be more quickly accomplished, since no delays would occur while additional data in connection with importations were being secured from abroad.¹⁵

Furthermore, the use of American valuation would secure an equal amount of revenue with much lower rates of duty, and as well, place the power to secure facts regarding values in the hands of American officials, who could compel the attendance of all interested parties in connection with the establishment of true market values.¹⁶

It was felt that American valuation was the best way to render undervaluations impossible, so that the government would receive all the revenue intended for it under the terms of any tariff measure.¹⁷ Also, in adopting this plan, countries with higher production costs would not be discriminated against, such as was the case when foreign valuation was used.¹⁸

Next, it was pointed out that in our first tariff act there was a provision for domestic valuation, but that, at that time, with manufacturing but slightly developed in this country, difficulty was naturally experienced in establishing the American value of many of the imported articles. It was claimed that this situation had changed, and that most imports now were of such character that their value in the American market was easily ascertainable.¹⁹

A final argument advanced in favor of the plan was to the effect that whenever monopoly conditions of production might prevail in the United States, which would give the producer the power to set prices, and so the duty, this could be obviated by placing a specific duty upon imports of similar commodities.

Shortly after the conclusion of the House hearings, the chairman of the Ways and Means Committee called upon the Tariff Commission to make any suggestions or proposals it might see fit, with regard to contemplated legislation providing for the

¹⁴ *Hearings, op. cit.*, pp. 4260-4271.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, pp. 4277-4278.

¹⁹ *Ibid.*, p. 4281.

assessing of ad valorem duties on American valuation. In the subsequently submitted report, the commission specifically stated that it was not expressing any opinion on the desirability of adopting the proposed change, but that its comments were based on the supposition that the committee had decided in favor of the plan.²⁰

The commission first noted the proportion of the import trade to which a change in the method of appraisement would apply. In 1913, 16.18 per cent of the imports of the United States were subject to ad valorem duties, and 4.75 per cent, to a combined ad valorem and specific duty. For 1914, the comparable figures were 21.58 per cent, and .42 per cent, for 1919, 10.95 per cent and .27 per cent, and for 1920, 12.06 per cent and .34 per cent.²¹

Turning next to the arrival at the foreign market value of imports, the difficulty of determining this value was cited, especially for those articles produced practically only for exportation. Furthermore, attention was called to the difficulty, and often the impossibility, of securing foreign costs. These difficulties, together with those incident to reliance upon invoices, variance between foreign consumptive values, and export prices, instability of exchange rates, and differences in cost of production in foreign countries, led the commission to say that nothing short of complete abandonment of foreign sources of valuation would be desirable.²²

The report concluded that the commission was mindful of the substantial difficulties involved in so fundamental a change in American customs administrative procedure, since the basis for appraisement used in most cases for the past hundred years had been the foreign market value. The practical lack of any foreign experience with such a method, and the possibility of ensuing litigation, were cited as well as the need for numerous amendments of the customs administrative laws. But it was finally

²⁰ U. S. Tariff Commission, *American Valuation*, (Government Printing Office, Washington, 1921), p. 38.

²¹ *Ibid.*, p. 5.

²² *Ibid.*, p. 6.

suggested that "this would naturally be true of any substantial change in the appraisal system."²³

With the testimony concerning American valuation as given in the Hearings and the commission's report, the Ways and Means Committee wrote section 402 of the tariff bill having to do with the matter of valuation, as follows:

"Except as otherwise provided by law, the word 'value' wherever used in this act or in any other law relating to the appraisement or the classification of imported merchandise shall mean the price on the date of exportation of the imported merchandise at which comparable and competitive products of the United States were ordinarily sold or freely offered for sale in the usual wholesale quantities and in the ordinary wrappings, coverings, and containers whether holding liquids or solids, to all purchasers in the ordinary course of trade, including all costs, charges, and expenses, in the principal market or markets of the United States; or when such value can not be ascertained to the satisfaction of the appraising officer, shall mean the value of the imported merchandise on said date for sale (whether or not there shall be an actual sale), for the consumption or use in the United States in its condition, including wrappings, coverings, and containers, whether holding liquids or solids, as imported. In determining the value for sale, appraising officers may take into consideration, among other matters, the selling price or cost of production of comparable products of the United States and of articles made therefrom or from like imported materials, not sold in usual wholesale quantities or not sold or freely offered for sale to all purchasers in the ordinary course of trade, or not sold at all, and the selling price in the United States of comparable imports or the selling price or market value or cost of production of the imported merchandise in the foreign country and may exclude or include all or any costs, charges, and expenses, including duties and also profits and commission, if any, keeping always in mind the legislative intent that duties ad valorem shall be assessed upon fair market value of the imported merchandise in the United States. No pretended sale or offer for sale, and no sale or offer for sale tending to establish a fictitious market shall be held to establish value as herein defined; nor shall a value substantially raised or lowered at the time of exportation otherwise than in the ordinary course of trade be deemed to be such a value."²⁴

This section provided for a complete change to the American valuation basis. In the majority report which accompanied

²³ U. S. Tariff Commission, *American Valuation*, *op. cit.*, p. 17.

²⁴ *H. Doc.*, No. 100, 67th Cong. 1st Sess., pp. 99-100.

the bill when it was presented to the House, was a rather lengthy section justifying the change. Two main reasons for its adoption were given and explained. First, that American valuation would eliminate, to a large degree, the long-continued practice of undervaluation. Second, that such a duty basis would equalize the amount of duty to be collected on similar articles from various countries, regardless of variation in foreign market values and fluctuations in currency. Special mention was made of the widespread depreciation of European currencies in the post-war period, with the result that production costs in those countries were reduced to such a point that effective American competition was practically impossible. Resort to American valuation was thought to be a substantial counteractive move. By adopting it, the necessity of relying on foreign sources of value, including invoices, as a means of determining the amounts of duty to be paid, would be obviated. Such values were to be retained as aids in determining value in the United States, but the dutiable value was to be made the wholesale selling price in the open markets of the United States of comparable and competitive domestic products. In the absence of such products, appraising officers were to ascertain the value of the imported merchandise for sale, whether or not there was an actual sale for consumption or use in the United States. The value in the United States of prior importations of the same or similar goods would be a factor in such cases in determining the dutiable value. In case the merchandise was not sold, such as materials made abroad and consigned to a branch house or factory or agent in the United States for further manufacture and sale of the completed product in the United States, the dutiable value was to be ascertained by deducting the elements of increased value from the selling price of the finished article.²⁵

In the minority report, the American valuation section was condemned, which section would change the basis of duty assessments from the actual price paid to a speculative opinion reached by an appraiser "hidden in the recesses of a customs house." The power of such appraiser to include or not, as he might see

²⁵ *H. Rept.* No. 248, 67th Cong. 1st Sess., pp. 20-24.

fit, duties, commissions, and profits, was attacked, and the conclusion reached that it would be impossible for the importer to know what duty he would have to pay until the goods were actually cleared through the customs house. The implication conveyed in its name, that it was an American proposition, was likewise condemned. It was pointed out that it had never been used in the United States except for the two months in 1842. The virtual destruction of the import trade was predicted by the minority if the policy was adopted. Objection was made to the statements in the majority report that undervaluation was widespread, and that currency depreciation was serious. Finally, the majority members were assailed for failing to provide for the conversion of rates in the bill in case the plan was adopted.²⁶

During the time the bill was being debated in the House, numerous remarks were made in favor of American valuation²⁷ while many others were made in opposition to it.²⁸ Most of the arguments given in this connection were those that had been heard previously during the House hearings. However, two new ones advanced in the House, bear repetition here.

The first was that American valuation would free the government from the many entangling diplomatic disputes that keep arising when duties are assessed upon foreign values. Also, that the new plan would reduce to a minimum the expense of foreign investigators.²⁹

The second was that the way was opened for pyramiding duties, especially where competitive and comparable American products could not be found. To illustrate this, one member of the House took a China grass chair, the wholesale value of which might be taken as \$1 in the United States, and upon which a duty of 50 per cent was levied. It would then be sold for \$1.50, but with the next importation, the American market price would be found to be \$1.50, and the duty would become seventy-five cents.

²⁶ *H. Rept.* No. 248, *op. cit.*, pp. 47-50.

²⁷ *61 Cong. Rec.*, 67th Cong. 1st Sess., Pt. 4, pp. 3489-3491, 3617-3620, 3643, 3769, 3779, 3811 and in Pt. 9, pp. 8435, 8473, 8481.

²⁸ *Ibid.*, Pt. 4, pp. 3492, 3710, 3711, 3727, 3482, 3849-3852, 4189.

²⁹ *Ibid.*, pp. 3475-3483.

This, the member held, could easily continue until the duty would become prohibitive.³⁰

There were no changes made in the valuation section by the House, presumably because the party in power had sufficient strength to pass a special rule governing the discussion of the bill which called for preference to committee amendments, and the committee was in favor of this section.³¹ The bill was passed by the House on July 21, 1921, by a vote of 288 to 127.³²

*American Valuation in the
Fordney-McCumber Bill of 1921-1922*

Hearings on the House Bill were begun by the Senate Finance Committee on July 25, 1921, and were concluded on January 9, 1922. Between August 31 and November 3, the committee held the tariff hearings in abeyance in order to consider internal revenue legislation.³³

Chairman Fordney considered the valuation section of such importance that he suggested it be considered first.³⁴ The arguments heard were largely those given in the hearings before the House committee, slightly different in wording but essentially the same in context.³⁵

In addition to the testimony gathered by the committee, there was referred to it, from the Senate, four amendments submitted by Mr. Smoot of Utah. Two of them, to use Mr. Smoot's words: "—provide for the so-called American valuation in a different form from that provided in the House bill."³⁶ These amendments follow:

"That when, in his judgment, the public welfare may require, the President shall direct that investigations be made of the conditions affecting competition in the American market between foreign and domestic producers of

³⁰ 61 *Cong. Rec.*, 67th Cong. 1st Sess., Pt. 4, pp. 3683-3695.

³¹ *Ibid* pp. 3607-3614 and Pt. 9, p. 8477.

³² *Ibid.*, Pt. 4, p. 4198.

³³ S. Doc. No. 108, 67th Cong. 2nd Sess., Vol. 5, Pt. 1, p. iii.

³⁴ *Ibid.*, p. 2.

³⁵ *Ibid.*, pp. 17, 18, 30, 43 (statements in favor of the plan) and pp. 2, 13, 95, 124, 265 (statements opposed to the plan).

³⁶ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 1, p. 36.

any article or articles. In such investigations account shall be taken of the wholesale market price at which said articles are sold or freely offered for sale, the wages and other production costs which may appear and any advantages of domestic and foreign producers in competitive trade. When the President shall find from such investigation that the duties in this act do not equalize the advantages of competing domestic and foreign producers of any article or articles he shall proclaim a list of such articles, together with such changes in classification and such increase or decrease of the duties on any or all of the articles or, in case of advantages due to the depreciation of foreign currency, such variations in any duty or duties on similar articles, enumerated in said list as he finds will equalize such advantages; and when he shall find that by reason of the depreciation of foreign currency or by reason of uncertain conditions in the market of the country of origin of any article or articles enumerated in such list the value in the market of such country is not a stable basis for the assessment of duties, he may direct and proclaim that any ad valorem duty or any duty based in whole or in part on value levied upon such article or articles shall be assessed upon the wholesale selling price of such or similar products in the principal market or markets of the United States at the time of importation of the imported merchandise; and thirty days after the date of such proclamation such changes in classification or variation in any duties or in the basis of assessment shall take effect and such increased or decreased duties shall be levied, collected, and paid on such articles when imported directly or otherwise from the country of origin into the United States; Provided, That the total increase or decrease of such duties shall not exceed 50 per cent of the duties fixed in this act until provided by law. The President may at any time by proclamation modify or revoke any such prior proclamation in whole or in part.

"That in the case of merchandise which is subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof, if the President shall find by reason of the depreciation of the currency or other unstable conditions in the country of origin of such merchandise, that value, as defined in section 402, Title IV of this act is not a certain basis for the assessment of duties, he may direct and proclaim that any ad valorem rate of duty or any duty based upon or regulated in any manner by the value of such merchandise shall be levied, collected and paid upon the wholesale selling price of such or similar articles in the principal market or markets of the United States at the time of exportation of the imported merchandise; Provided, however, That in such cases said duties may be increased or decreased in accordance with Section 1 and thirty days after the date of such proclamation such imported merchandise shall be thus valued for the purpose of the assessment of duties."

(Note—This section will be applicable only in case Congress restored in

section 402, Title IV, the foreign market value as the basis for the assessment of ad valorem duties.)³⁷

No discussion of these amendments took place in the Senate; they were simply ordered printed and referred to the Finance Committee. When that committee subsequently submitted the revised House bill to the Senate, the influence of Mr. Smoot's amendments can be clearly seen. The section (402) of the House bill providing for American valuation was completely eliminated, and the existing foreign valuation basis was returned. In the rewritten section 402, subdivision (a), paragraph (4), it was provided that "If there be any similar competitive article manufactured or produced in the United States of a class or kind upon which the President has made public a finding as provided for in section 315 of Title III of this Act, then the American selling price of such article." And this American selling price was defined in subdivision (f) as follows: "The American selling price of any article manufactured or produced in the United States shall be the price including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities and the price that the manufacturer, producer, or owner would have received and was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported merchandise."³⁸

That part of section 315 which is referred to in section 402 is as follows:

(b) "That in order to regulate the foreign commerce of the United States and to put into effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in conditions of competition in trade, in the markets of the United States, of articles wholly or in part the growth or product of the United States and of like or similar articles

³⁷ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 1, p. 35.

³⁸ *S. Doc.* No. 187, 67th Cong. 2nd Sess., pp. 119-121.

wholly or in part the growth or product of competing foreign countries, shall find it thereby shown, that an industry in the United States is being or is likely to be materially injured by reason of the importation into the United States of foreign merchandise and shall find it thereby shown that the value as determined under the provisions of paragraphs (1), (2), or (3) of section 402 of this Act, is not a certain basis for the assessment of the particular duties, he shall make such findings public, together with a description of the class or kind of merchandise to which they apply in such detail as he may deem necessary for the guidance of appraising officers; that in such cases and upon proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported merchandise upon which the President has made public a finding and proclamation.

"That the ad valorem rate or rates of duty based upon such American selling price shall be the rate found upon said investigation by the President to be shown by the said differences in conditions of competition or trade in the markets of the United States necessary to equalize the differences so found in said conditions of competition in favor of either foreign manufacturers or producers, but no such rate shall be decreased or increased more than 50 per centum of the rate specified in Title I of this act upon such merchandise. Such rate or rates of duty shall become effective 30 days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid upon such merchandise in the manner herein provided when imported directly or otherwise from the country of origin into the United States."⁸⁹

In brief, this section provided, that if any rate contained in the act was found not to equalize conditions of competition here and abroad, the President, after an investigation, was to have the power to change the dutiable base to the American selling price provided he did not, in addition, change the rate in the act by more than 50 per cent in either direction. This was in line with Mr. Smoot's idea of providing for resort to American valuation in the event the duty based upon foreign value proved insufficient. It was a way of dealing with changing economic conditions without waiting for Congress to act, even

⁸⁹ *S. Doc. No. 187, 67th Cong. 2nd Sess., pp. 111-112.*

though this change was possible only within the limits set up in the section. The Finance Committee seemed uncertain of the outcome of this section, thus, they made out two different schedules of duties, one to apply if the finally passed bill provided for American valuation, and the other to apply, if it continued the foreign valuation practice.⁴⁰

In submitting the majority report with the Senate bill, Mr. McCumber stressed the fact that in attempting to fix rates, the committee was faced with a condition never before experienced in tariff legislation, namely, the great divergence in production costs for the same or similar articles in different countries. The inclusion of certain flexible sections, he felt, would carry out the suggestion made by the President in his message to Congress of December 6, 1921, that a way be found to provide elasticity and flexibility in the tariff bill, so that rates could be adjusted to meet the unusual and changing economic conditions, which could not then be accurately anticipated. One of the four provisions in the Senate bill embodying this idea, was subdivision (b) of section 315. He said further that American valuation under the elastic tariff, was treated as an emergency measure for the purpose of meeting unusual conditions which might arise, and that the President might introduce it gradually when he felt foreign values were uncertain bases for the levying of ad valorem duties.

In the majority report, a statement was made to the effect that complete American valuation was early abandoned, because of the limited number of exactly comparable domestic and foreign products, because of the difficulty and probable litigation involved in defining comparability to the satisfaction of all the interested parties, and finally, because of the disturbance to business while these difficulties were being adjusted. With respect to undervaluation, the report stated that "In regard to undervaluation, your committee believes that its prevention is more a matter of efficient customs administration than one to be corrected by any valuation plan."

In conclusion, the report stated that: "The impossibility

⁴⁰ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 6, p. 5763.

of adjusting rates applicable alike to comparable and non-comparable goods; the great obstacle in the way of proper safeguards at the time of entry; the impossibility of American buyers in foreign markets knowing with any degree of accuracy what duties they would have to pay if their merchandise is appraised at the prices of comparable domestic goods; the impracticability of determining comparability; and the entire readjustment of the customs machinery are disadvantages of the American valuation plan which are not adequately offset by any advantage that might be secured under that plan. Your committee therefore, recommends that the value basis of existing law be continued and substituted for the American valuation plan embodied in the House bill.—Dutiable value must be an ascertained fact. Theoretical values contingent upon future conditions are incapable of administration and difficult to establish.”⁴¹

The minority report loses much of its significance if rephrased. The part relative to the valuation question follows:

“The majority report—devoted a considerable part—to an elaborate discussion of the American valuation scheme and the reasons which forced them, regretfully, to scrap that monstrosity as a basis of levying the duties prescribed in the bill and in assuring the bereaved advocates of this scheme that while not applying it to the rates fixed by the committee, they have clothed the President with power to overrule the committee in this respect and substitute the Fordney scheme wherever those desiring it can convince him that that scheme of embargoing importations is essential to enable them to maintain present high profits or advance them to still higher levels. This rather elaborate discussion of the reasons for scrapping the American valuation scheme on the one hand while providing for its rehabilitation on the other hand was probably deemed expedient and necessary to placate the greedy interests who with such persistence and vehemence have pressed upon the Congress this shrewdly devised method of extorting gratuities for the enhancement of their already swollen profits.”⁴²

The remainder of the minority report contained a protest upon the high rates found in the bill, and the possibility that these

⁴¹ *S. Rept.* No. 595, 67th Cong. 2nd Sess., pp. 1-8.

⁴² *Ibid.*, Vol. 1, Pt. 2, pp. 1-9.

could be made even higher by presidential action under section 315.

Almost immediately upon presentation of the bill in the Senate, Mr. Jones (N. Mex.) asked whether or not the valuation question would be taken up first, or whether the amendments would be considered upon the theory that the foreign valuation policy was to be continued. Mr. McCumber's answer to this was significant: "The committee reported in favor of foreign valuation and the committee, through its chairman, will take that stand all the way through. I do not know that there is anyone in the Senate who will raise the question of American valuation."⁴³

Mr. Smoot, one of the first speakers in support of the bill, spoke at length on the valuation section. He favored it, since less disturbance to business would be occasioned by it, than would be the case if the House scheme were adopted. He added that many uninformed people preferred the American plan, since it was a case of something American versus something foreign. He was convinced that manufacturers were turning to favor the foreign value basis, since such values, in so many cases, offered them greater security than equivalent rates on American values.⁴⁴

The next change which took place in the Senate with respect to American valuation, was when Senator McCumber offered an amendment to the whole of the section as it came from the Finance Committee. The alteration in subdivision (b) of the section, which had to do with valuation, was one in procedure rather than in principle. In the original committee bill, as above stated, the President, if upon investigation of the facts, found that conditions of competition were not equalized by the rates in the bill with the dutiable value determined from the foreign value, he was to declare such products dutiable upon the American selling price. Mr. McCumber's amendment, following, was explained by him to be a means whereby the administration of the section would be made more logical.

⁴³ *62 Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 6, p. 5766.

⁴⁴ *Ibid.*, pp. 5874-5881.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended whenever the President upon investigation of the differences in conditions of competition in the principal markets of the United States of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of foreign countries, shall find it thereby shown that the duties prescribed in this act do not equalize said differences and shall find it thereby shown that the said differences can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public together with a description of the class or kind of merchandise to which they apply in such detail as may be necessary for the guidance of appraising officers. In such cases and upon proclamation by the President becoming effective, the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price as defined in subdivision (f) of section 402 of this act of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported merchandise upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President to be shown by the said differences in conditions of competition in the principal markets of the United States necessary to equalize the differences so found in said conditions of competition, but no such rate shall be decreased or increased more than 50 per cent of the rate specified in Title I of this act upon such merchandise. Such rate of duty shall become effective 60 days after the date of said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such merchandise when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of merchandise, upon which the President has made public a finding for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this act.⁴⁵

The President was thus to first proceed under subdivision (a) of the section, and if an increase or decrease of 50 per cent upon the foreign value did not prove sufficient to equalize the condi-

⁴⁵ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11152.

tions of competition at home and abroad then, and then only, should he change the dutiable value to the American selling price.

Subsequently, when this part of the McCumber amendment was being debated, Mr. Lenroot asked why the President should be allowed to increase the rate up to 50 per cent, and then change the valuation basis, in addition.⁴⁶ No action was taken by the Senate on this point, but when the bill reached the Conference Committee, it struck out the words "or increased" and added the words "nor shall any rate be increased." The effect of this was that if an increase of the rate by 50 per cent was found insufficient to equalize costs, then a change might be made, under subdivision (b), to the American selling price, but that in the event of such a change in the dutiable base, no increase (up to 50 per cent) was to be allowed in the rate as set in the act.⁴⁷ While no explanation is made of any of the Conference Committee's changes, this one can be assumed to be in the nature of a reasonable restriction upon the extent to which a rate could be raised under this subdivision.

Early in the debate on this section, Mr. Jones had asked why the committee, in deciding against American valuation for the entire schedule of rates, had allowed recourse to it by the President under subdivision (b). Mr. Smoot had answered that, practically the only articles upon which such action would be necessary, were those in schedule I where foreign and domestic conditions could not be equalized by an increase of 50 per cent upon the foreign value. In view of this stated condition of affairs, the next amendment, offered by Mr. McCumber, was that subdivision (b) should apply only to articles in paragraphs 25 and 26, the ones where an increase of 50 per cent of the prevailing rate, under subdivision (a), would be totally ineffective in achieving equalization.⁴⁸ When this amendment was later brought to a vote, it was agreed upon.⁴⁹ But the Conference Committee, in this respect, reverted to the original form of the subdivision, and made resort to American valuation available

⁴⁶ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11190.

⁴⁷ *Ibid.*, Pt. 12, p. 12456.

⁴⁸ *Ibid.*, Pt. 11, p. 11209.

⁴⁹ *Ibid.*, p. 11225.

to all items subject to ad valorem duties, in whole or in part, under the conditions set in the section.⁵⁰

Another change is noted in the text of this subdivision. The words "conditions of competition" are replaced by "costs of production". This is a primary change, but since it affects subdivision (a) more directly than subdivision (b), consideration of it will be deferred until the following chapter where that subdivision is treated in detail.

One other change took place in the section. The time after which the President's proclamation was to go into effect, was changed from 60 days, in the original amendment, to 15 days. Mr. Smoot explained that if importers were allowed 60 days of grace before such a proclamation became effective, they would have ample time to import goods enough to supply the domestic market for as long a period as two years thereafter, thus, in part, nullifying the effect of the section.⁵¹ The Senate agreed to the change.⁵²

The Conference Committee report was passed by the House on September 15, 1921,⁵³ but in the Senate, Mr. Simmons rose to say that he firmly believed the conferees had exceeded their authority in the matter of authorizing the President to proclaim American valuation. The Senate had authorized him to use this valuation upon only the items in paragraphs 25 and 26, and the House had not allowed the President to declare American valuation upon anything.⁵⁴

Mr. McCumber answered this charge,⁵⁵ but the question was not settled thereby. Consequently, the chair was called upon to rule on the Conference report and in approving it, pointed out that the Senate could have adopted the House American valuation, while the House could have adopted the Senate foreign valuation. Actually, the House American valuation was given up by it, and foreign valuation accepted with the authority given the President to employ American valuation upon the whole dutiable

⁵⁰ 62 Cong. Rec., 67th Cong. 2nd Sess., Pt. 12, p. 12456.

⁵¹ *Ibid.*, Pt. II, p. 11598.

⁵² *Ibid.*, p. 11601.

⁵³ *Ibid.*, Pt. 12, p. 12718.

⁵⁴ *Ibid.*, p. 12753.

⁵⁵ *Ibid.*

schedule whenever he might find that action necessary in order to equalize the differences in costs of production at home and abroad.⁵⁶ An appeal from the chair's decision was upheld by a vote of 43 to 21.⁵⁷ On September 19, the Senate accepted the Conference report,⁵⁸ and three days later, the President signed the bill.

The final form of section 315 (b) as it appeared in the 1922 Act follows:

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing foreign country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United

⁵⁶ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 12, p. 12795.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 12907.

States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.⁵⁹

The Tariff Act of 1922, therefore, provided some encouragement to those advocating the adoption of the American valuation plan. In paragraphs 27 and 28 of the finally enacted bill, the American selling price is to be the basis used, at all times, for the assessment of duties upon the articles there enumerated. And in subdivision (b) of section 315, the American selling price can be adopted by the President as the dutiable base in all cases where he determines that an increase of 50 per cent on the foreign value will not equalize costs of production in the United States and the principal competing foreign country. This latter provision makes potential, at least, the ultimate application of the American valuation plan to all imports dutiable in whole or in part upon their value under the conditions specified in the section.

American Valuation in the Hawley Bill of 1929

The question of American valuation in the tariff revision of 1929-1930, received, relatively, less consideration than was the case in 1921-1922, and yet it lost none of the ground gained in the 1922 Act.

During the House hearings on valuation bases, from January 7 to February 25, 1929, the arguments for⁶⁰ and against⁶¹ American valuation were largely those that had been used during the 1921-1922 discussion on the point.

⁵⁹ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XLII, Pt. I, p. 942.

⁶⁰ *Hearings before the Committee on Ways and Means on Tariff Readjustment—1929*, 70th Cong. 2nd Sess., Vol. XVI, pp. 9780-83, 10194-10203, 10203-10208, 10209, 10210-10212, 10216-10217, 10228-10230, 10239-10248, 10267-10269 and Vol. XVII, pp. 10676-10680.

⁶¹ *Ibid.*, Vol. XVI, pp. 10255, 10257-10264, 10267, 10270-10273.

In spite of the apparent preponderance of testimony in favor of American valuation, the House bill, when finally presented to the House, continued the foreign value basis with only the two references to American valuation that were contained in the 1922 Act, as given above. The text of section 336 (b), the section and subdivision comparable to section 315 (b) of the 1922 Act, follows:

(b) Change to American Selling Price.—If the President finds, upon any such investigation, that such differences can not be equalized by proceeding as hereinbefore provided, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers, and shall proclaim that the ad valorem rate of duty or rates of duty based in whole or in part upon the value of the like or similar competitive imported article in the country of exportation shall thereafter be based upon the American selling price (as defined in subdivision (g) of section 402 of this Act) of the domestic article. The President shall further proclaim such ad valorem rate or rates of duty based upon such American selling price as in his judgment are shown by an investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.⁶²

While the wording of this section differed somewhat from that of 315 (b), nevertheless, the fundamental provision was the same.

However, in the House bill was included a new section:

Section 642. Investigation of Methods of Valuation.

The President is requested (1) to cause a survey to be made, by such agency or agencies as he may designate or appoint, of the bases for the valuation of imported merchandise for the assessment of customs duties, particularly with a view to determining the extent to which values in the United States may properly be used as a basis for the assessment of customs duties; and (2) to submit to Congress, at the earliest practicable date, a report thereon, with such recommendations for legislation as he may deem advisable, including such formulae as he may propose for adjusting the rates of duty imposed by this Act to conform to any change in basis he may recommend. There are hereby authorized to be appropriated such sums as may be necessary to

⁶² *H. Doc. No. 15, 71st Cong. 1st Sess., pp. 160-161.*

carry out the provisions of this section, to be expended at the discretion of the President.⁶³

Very brief was the mention of this section in the House report submitted with the bill. The committee said it had been urged to depart from the basis prescribed by present law, and adopt either the American selling price or the United States value as the dutiable basis. It decided in favor of the existing method, but requested the President to make an intensive survey of the whole problem, and submit the results to Congress at the earliest possible date.⁶⁴

The bill was debated in the House from May 9 to May 29 when it was passed and sent to the Senate. During the debate, very little was said about American valuation. Apparently, the question had reached a point where further debate upon it seemed unnecessary. A working arrangement, so to speak, had been effected, and both sides seemed willing to rest their case until the provided-for report of the President was forthcoming. American valuation, therefore, did not suffer at the hands of the House. All the instances of it in the 1922 Act had been continued, and section 642 opened new and interesting possibilities.

American Valuation in the Hawley-Smoot Bill of 1929-1930

The hearings on the House bill conducted by the Senate Finance Committee, developed little new with respect to arguments for⁶⁵ and against American valuation.⁶⁶ The appearance of section 642 caused considerable comment, many stating that its inclusion in the House bill indicated that the House was favorably disposed toward the American plan, but that it wanted concrete information before giving it formal endorsement. Others, just as insistently, held that the President's report would conclusively prove that the adoption of American valuation would be impracticable, if not impossible.

⁶³ *H. Doc. No. 15, op. cit.*, pp. 240-241.

⁶⁴ *Ibid.*, pp. 340-341.

⁶⁵ *Hearings before the Committee on Finance of the Senate*, 71st Cong. 1st Sess., Vol. XVII, pp. 51, 71, 613-661, 681-709, 760-762, 789-790.

⁶⁶ *Ibid.*, pp. 661-668, 710-730, 782-786.

When the House bill emerged from the Senate Finance Committee in September, 1929, two changes were in evidence with respect to American valuation. Section 642 had been dropped entirely, and a new section, 340, appeared in the text of the bill, as follows:

Section 340. Domestic Value.—Conversion of Rates.

(a) Conversion of Rates by the Commission. The Commission shall ascertain with respect to each of the ad valorem rates of duty and such of the rates of duty regulated by the value of the articles specified in this Act, an ad valorem rate (or a rate regulated by the value of the article, as the case may be) which if applied upon the basis of domestic value would have resulted as nearly as possible in the imposition during the period from July 1, 1927, to June 30, 1929, both dates inclusive, of amounts of duty neither greater nor less than would have been collectible at the rate specified in this Act applied upon the basis of value defined in section 402 of the Tariff Act of 1922.

(b) Report to Congress by the Commission. The Commission shall, as soon as practicable, but in no event later than January 1, 1932, submit a report to the Congress setting forth the classes of articles with respect to which the conversion of rates has been made, together with the converted rates applicable thereto.

(c) Data to be furnished by the Secretary of Treasury and the Secretary of Commerce. To assist the Commission in carrying out the provisions of this section, the Secretary of Treasury and the Secretary of Commerce are authorized and directed to furnish to the Commission, upon request, any data or information in the possession or control of their respective departments relating to the importation, entry, appraisement, and classification of merchandise and the collection of duties thereon.

(d) Definitions. When used in this section—

(1) The term "Domestic value", applied with respect to imported merchandise means

(A) The price at which such or similar imported merchandise is freely offered for sale at the time of importation of the imported merchandise, packed ready for delivery, in the principal market of the United States to all purchasers in the usual wholesale quantities and in the ordinary course of trade, or

(B) If such or similar imported merchandise is not so offered for sale in the United States, then an estimated value based on the price at which merchandise, whether imported or domestic, comparable in construction or use with the imported merchandise is so offered for sale, with such adjustments as may

be necessary owing to differences in size, material, construction, texture, and other differences.

- (2) The term "rate of duty regulated by the value of the article" means a rate of duty regulated in any manner by the value of the article, and includes the value classification by which such rate is regulated.⁶⁷

The Senate Report, submitted with the bill, stated that a change in the valuation basis had been urged upon Congress for many years, but that each tariff act had retained the foreign value basis chiefly because adequate information had never been available for the proper conversion to a domestic value basis, and because all previous attempts contemplated an immediate change in all rates without adequate preparation on the part of customs officials. The committee went on to endorse domestic valuation, and for that reason, it placed the new section in the bill in order that the Tariff Commission might work out the conversion of the rates to such a basis. Upon completion of that task, Congress would "be in a position to make the desirable shift to the domestic value basis." In conclusion, the committee said that inasmuch as it was definitely in favor of a domestic value basis, section 642 of the House bill seemed unnecessary and so, had been discarded.⁶⁸

Early in the Senate debate on the bill, Mr. Smoot offered an amendment to this section so that in part (d) (1) (A) it would read "The price at which such or similar imported merchandise is freely offered for sale at the time of exportation (instead of 'importation') of the imported merchandise—". He said that the word "exportation" had been used in the bill presented to the Senate because of a clerical error. His amendment was agreed to.⁶⁹

The only important subsequent action taken, was the reinstatement of section 642. Mr. Walsh asked for this in order that the extent of undervaluation might be determined, and to see if the change in valuation basis really was needed.⁷⁰

⁶⁷ *S. Doc. No. 21*, 71st Cong. 1st Sess., pp. 134-135.

⁶⁸ *71 Cong. Rec.*, 71st Cong. 1st Sess., Pt. 3, p. 4154.

⁶⁹ *Ibid.*, p. 4154.

⁷⁰ *Ibid.*, pp. 4167-4172.

These two sections, 642 and 340, remained unchanged during the subsequent stages of the bill, except that the due-date of the Tariff Commission's report to Congress was set at July 1, 1932, instead of January 1, 1932, as in the original committee amendment, presumably because of the length of time the bill was before the Senate.

In the final bill, as well, appear the two provisions for American valuation of the House bill: in paragraphs 27 and 28 and in subdivision (b) of section 336. This latter provision reads:

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402: (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.⁷¹

A change is noted in the procedure under this section from that provided in the original House section. In that, the President was to act thus if he felt such a change was necessary. Now, the Tariff Commission states the action the President is required to take. This is an important change, but since it affects the entire section, its consideration will be deferred until a later chapter dealing with the evolution of section 336 as a whole. In the present connection, the essential feature of the subdivision is that it continues, practically, the provision included in section 315 (b) of the 1922 Act insofar as American valuation is concerned.

Thus, further Congressional action on the question of American valuation will likely be held in abeyance until such time as the two reports thereon shall have been presented to Congress by the President and the Tariff Commission. The practical effect of the provisions in the present act is, as was the case under the 1922 Act, very much the same as if American valuation had been provided for all the items subject in any way to ad valorem

⁷¹ *The Statutes at Large of the U. S. of America*, (Government Printing Office, Washington, 1930), Vol. XLVI, Pt. 1, p. 701.

duties. Resort can be had to the American selling price under 336 (b) in the event that a 50 per cent increase in the rate based upon the foreign value, under 336 (a), is not sufficient to equalize domestic and foreign costs of production.

It is the appearance of this alternative duty basis in section 315 of the 1922 Act, and section 336 of the 1930 Act, that has made a study of the question seem advisable for the purposes of this dissertation. While definitely a part of the flexible tariff plan, the question of American valuation has a sufficiently individual aspect to warrant a separate consideration of it.

The United States now has American valuation under the conditions noted above. What the next change in this connection will be it is impossible to forecast now. But it can be safely said that the question will again appear in Congress for debate and action on or about July 1, 1932, at which time, it might be logical to expect some more or less permanent disposition of it by that body.

III

THE FLEXIBLE TARIFF PROVISION

On December 6, 1921, the idea of flexibility was first mentioned in connection with the American tariff. On that day, two government officials spoke concerning it. President Harding, in his message to Congress, gave the country his conception of the problem as follows:

"I hope a way will be found to make for flexibility and elasticity, so that rates may be adjusted to meet unusual and changing conditions which can not be accurately anticipated.—I know of no manner in which to effect this flexibility other than the extension of the powers of the Tariff Commission, so that it can adapt itself to a scientific and wholly just administration of the law.

I am not unmindful of the constitutional difficulties. These can be met by giving authority to the Chief Executive, who could proclaim additional duties to meet conditions which the Congress may designate.

* * * * *

The grant of authority to proclaim would necessarily bring the Tariff Commission into new and enlarged activities, because no Executive could discharge such a duty except upon the information acquired and recommendations made by this Commission. But the plan is feasible, and the proper functioning of the board would give us a better administration of a defined policy than ever can be made possible by tariff duties prescribed without flexibility.

* * * * *

In this proposed flexibility, authorizing increases to meet conditions so likely to change, there should also be provision for decreases. A rate may be just today and entirely out of proportion six months from today. If our tariffs are to be made equitable, and not necessarily burden our imports and hinder our trade abroad, frequent adjustment will be necessary for years to come. Knowing the impossibility of modification by act of Congress for any one or a score of lines without involving a long array of schedules, I think we shall go a long ways toward stabilization, if there is recognition of the Tariff Commission's fitness to recommend urgent changes by proclamation."¹

¹ *Sixth Annual Report of the U. S. Tariff Commission, 1922*, pp. 1-2.

In these words, the President struck the key-note of the whole question, namely, the need for some sort of a flexible tariff which would be an aid in keeping tariff rates adjusted to the constantly changing conditions, so prominent during the war and the post-war periods. The House had suggested American valuation because of the prevailing instability, but even the adoption of that change would not have proven a complete solution to the difficulty unless both American and foreign prices became relatively stabilized at the levels existent at the time the rates were set. This was very unlikely, especially with respect to foreign prices. Flexibility in the tariff seemed not only expedient but urgent unless Congress would be willing to face a recurring need for tariff revision until such time as world economic stability was recovered.

On this same day, Senator Smoot presented to the Senate his four amendments, above referred to. In addition to the amendments given in the preceding chapter, these two were offered by Mr. Smoot.

That in the case of dutiable merchandise which is imported, directly or otherwise, from a country whose currency has depreciated more than 5 per cent from the value of the pure metal of its standard coin, if the President shall find that competitive advantages are accruing to producers in such countries because of such depreciation, he shall determine the duties which will respectively equalize such competitive advantages and shall proclaim a list of such products thus affected and such respective equalizing duties applicable thereto, and 30 days after the date of such proclamation there shall be levied, collected, and paid in addition to the duties otherwise provided such equalizing duties, not exceeding 50 per cent of the value of the respective imported articles; that the President may, in determining such equalizing duties, take into account the prices at which such or similar products are sold in the United States and competing foreign countries, wages, prices of materials and other items in the costs of production of such or similar products in the United States and competing foreign countries, and any advantage of domestic and foreign producers in competitive trade; Provided, That the President may modify such equalizing duties or remove products from said list when he shall determine that the competitive advantages have changed or no longer exist which led to the inclusion of such products in said list.

That it shall be the duty of the President to ascertain differences in condi-

tions of competition in trade of such or similar products in the United States and competing foreign countries which will enable him to find what rates of duty upon imported merchandise will equalize any differences which he may find to exist in favor of foreign producers in marketing such products in the United States; that in determining such differences the President may take into account prices at which such or similar products are sold in the United States and competing foreign countries, wages, prices of materials, and other items in costs of production of such or similar products in the United States and competing foreign countries and any advantages of domestic and foreign producers in competitive trade; that upon ascertainment of such information the President may proclaim any changes in classification provided for in this act or such increases or decreases in any rate of duty as he shall determine will equalize such differences in the markets of the United States and 30 days after the date of such proclamation all such changes in classification shall take effect and all such increased or decreased rates of duty shall be levied, collected, and paid; Provided, That the total increase or decrease of such rates shall not exceed 50 per cent of the rates provided in this act until further notice provided by law.²

With respect to the flexible tariff idea, two major issues stood out clearly. The first had to do with American valuation, which has already been considered in the preceding chapter. The second had to do with the power that, it was suggested, should be given to the President to change the rates actually set by Congress, under certain conditions. A flexible arrangement was generally approved by Congress, but just how this should be effected was attended by extended debate and widespread diversity of opinion.

After the statement of the President and the submission of Mr. Smoot's amendments, it was anticipated that the revised House bill, when presented to the Senate, would provide, in some way, for flexibility. Section 315 justified these expectations.

Section 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in conditions of competition in trade in the markets of the United States of articles wholly or in part the growth or product of the United States

² 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 1, p. 35.

and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in conditions of competition in trade, he shall, by such investigation, ascertain said differences and determine and proclaim the change in classification or forms of duty or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in conditions of competition in trade necessary to equalize the same in the markets of the United States; that 30 days after the date of such proclamation or proclamations such changes in classification or in forms of duty shall take effect and such increased or decreased duties shall be levied, collected and paid on such merchandise when imported directly or otherwise from the country of origin into the United States; Provided, That until further provided by law the total increase or decrease of such rates of duty shall not exceed 50 per cent of the rates specified in this Act, or in any amendatory act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in conditions of competition in trade in the markets of the United States, of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown, that an industry in the United States is being or is likely to be materially injured by reason of the importation into the United States of foreign merchandise and shall find it thereby shown that the value as determined under the provisions of paragraphs (1), (2), or (3) of subdivision (a) of section 402 of this act is not a certain basis for the assessment of the particular duties, he shall make such findings public together with a description of the class or kind of merchandise to which they apply in such detail as he may deem necessary for the guidance of appraising officers; that in such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported merchandise upon which the President has made public such a finding and proclamation.

That the ad valorem rate or rates of duty based upon such American selling price shall be the rate found upon said investigation by the President to be shown by the said differences in conditions of competition of trade in the markets of the United States necessary to equalize the differences so found in said conditions of competition in favor of either foreign manufacturers or producers, but no such rate shall be decreased or increased more than 50 per

centum of the rate specified in Title I of this Act upon such merchandise. Such rate or rates of duty shall become effective 30 days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid upon such merchandise in the manner herein provided when imported directly or otherwise from the country of origin into the United States.

(c) That in any investigation provided for in this section account may be taken of the price at which like or similar merchandise is sold in the United States and competing foreign countries, wages, prices of materials, and all other items in costs of production of such or similar merchandise in the United States and competing foreign countries and any advantages of domestic or foreign producers in competitive trade, including laws and regulations affecting the same; that no proclamation shall issue under this section unless reasonable opportunity shall be afforded to all persons directly interested in the production and distribution of such merchandise affected by such proclamation, that the President proceeding as hereinbefore provided for the proclamation of such rates of duties, may, when he shall determine that it is so shown that the competitive advantages have changed or no longer exist which led to such proclamation, accordingly as so shown modify or terminate the same.

(d) For the purposes of this section, any coal-tar product provided for in paragraphs 25 or 26 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

If in any investigation under this section, the President ascertains as a fact that the rates specified in paragraphs 25 or 26 of Title I of this Act or imposed under the provisions of this section do not equalize the differences in competition in trade in the markets of the United States of any such article wholly or in part the product of the United States and of like or similar articles wholly or in part the product of competing foreign countries or ascertains as a fact that an industry in the United States is being or is likely to be materially injured by reason of the importation of like or similar articles into the United States, he is authorized and it shall be his duty to issue a proclamation stating such fact, and the provisions of the Dye and Chemical Control Act, 1921, as amended, shall be in full force and effect from the date and for the period stated in any such proclamation, but the aggregate period shall not exceed one year.

(e) If there is any imported article within the class or kind of merchandise, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions

of paragraphs (1), (2), and (3) of subdivision (f) of section 402 of this Act.

(f) The Secretary of the Treasury is empowered to make such rules and regulations as he may deem necessary for the entry and declaration of imported merchandise of the class or kind of merchandise upon which the President has made public a finding under the provisions of this section and for the form of invoice required at time of entry.³

In addition to this section, the Finance Committee struck out the American valuation section of the House bill, and reinstated the prevailing foreign valuation system.

The majority report referred to the President's message to Congress, and stated that section 315 was in response to his desire to secure a flexible tariff arrangement. This section, it was claimed, would contribute to tariff stability by preventing the accumulation of cases which eventually would force the upheaval of a general tariff revision. Provision was made for investigations of possible tariff changes under judicial procedure with interested parties being given due notice of them and an opportunity to be heard before changes would actually be made.⁴

The minority report did not refer to the section in particular, but in bemoaning the height of the duties imposed by the act, it referred to the possibility of the rates being made even higher through the operation of section 315.⁵

Mr. McCumber and Mr. Smoot delivered the two opening speeches in defense of the bill. Both of these senators praised the flexible section as a means of effectively dealing with the prevalent instability of world economic conditions.⁶

Debate then proceeded upon this section, specifically. Since the most important part of the discussion centered around the point of what was to be equalized by the President's action, that discussion and its final outcome will now be considered.

Mr. Jones (N. Mex.) opened the subject by asking what was really meant by the term "competition in trade", the expression used in the Finance Committee amendment. Mr. Smoot

³ *S. Doc.* No. 187, 67th Cong. 2nd Sess., p. III.

⁴ *S. Rept.* No. 595, 67th Cong. 2nd Sess., Pt. 1, pp. 3-4.

Ibid., Pt. 2, p. 2.

⁶ *62 Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 6, p. 5763 and pp. 5874-5881.

replied that in an investigation, not only wages would be considered but, also, the question of depreciated currency.⁷

Following this, Mr. Simmons pointed out that the section set a definite principle upon which rates were to be made, but that that principle was not that rates should equalize costs of production, or such costs plus a reasonable profit to the domestic producer, or differences in intrinsic value, but that they should equalize differences in the conditions of competition in trade. Such a yardstick would fix a rate which would bring up the foreigner's price to the point at which the American producer sells his product in the American market without any reference to what part of the domestic selling price was production cost and what part, profits; what part represented true value and what part, water.⁸

This statement was the first to call attention to the fact that by using the term "conditions of competition", it would be both possible and probable that the element of profit would become a consideration in the determination of differences in such conditions.

Mr. Walsh asked what items were to be considered by the President in equalizing conditions of competition, what country was to be taken as the standard, what American producer was to be so taken, and to what degree profits should be included. He said that "a perfectly unrestrained discretion is reposed in the President in that regard, a feature which is fatal to the system proposed."⁹

Whereupon, Mr. Simmons urged that equalization be effected between foreign and domestic costs of production instead of conditions of competition, since the latter would allow the consideration of profits which could conceivably be twice here the amount they were abroad.¹⁰

Then came Mr. McCumber's amended section 315 in which "conditions of competition in trade" replaced "conditions of competition."¹¹

⁷ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 6, p. 5886.

⁸ *Ibid.*, p. 5999.

⁹ *Ibid.*, pp. 6493-6501.

¹⁰ *Ibid.*, p. 6504.

¹¹ *Ibid.*, Pt. 11, p. 11152.

In subdivision (c) a considerable change was made in Mr. McCumber's section. In the original Senate committee amendment, the President was to take into account "the price at which like or similar merchandise is sold in the United States and competing foreign countries, wages, prices of materials, and all other items in costs of production—and any other advantages of domestic or foreign producers in competitive trade—." In the McCumber amendment, subdivision (c) was amplified to include "the differences in the wholesale selling prices of domestic and foreign merchandise in the principal markets of the United States, but in considering prices as factors in ascertaining differences in conditions of competition, only reasonable profits shall be allowed, and any other advantages or disadvantages in competition."¹²

Shortly after the McCumber amendment was presented, Mr. Lenroot offered an amendment that the words "costs of production" be substituted throughout the section, for the words "conditions of competition." This was ordered printed, and to lie on the table.¹³

Mr. Sterling asked if the bill could not be changed so as to limit the President to definite factors in his action, and Mr. Lenroot replied that that was the purpose of his amendment, that it would set up a much more definite standard than would be set up if the term "conditions of competition" was used.¹⁴

Of all the debate on this phase of the section, Mr. Lenroot's observation seemed to be the real reason for the subsequent adoption of his suggestion. Differences in costs of production could be more easily defined than differences in conditions of competition. And if the constitutionality of the section was to become an issue, then this more definite standard would be a point in its favor.

Debate continued on the choice of the thing to be equalized by the President,¹⁵ and then Mr. McCumber rose to ask Mr. Lenroot to withdraw his amendment, since he was about ready

¹² 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11152.

¹³ *Ibid.*, p. 11180.

¹⁴ *Ibid.*, p. 11189.

¹⁵ *Ibid.*, pp. 11192-11208.

to offer a committee amendment to cover the point contained in his amendment, and Mr. Lenroot did so.¹⁶

In submitting the committee amendment, Mr. McCumber said that the majority of the Finance Committee had decided to substitute the words "costs of production", for "conditions of competition". He still preferred the other language, but felt that continued insistence, on his part, would mean a long debate on the point, so he agreed to the committee's suggested change.¹⁷

The fact that the change came in the form of a committee amendment practically assured its passage, and it did so pass when it was later brought to a vote. It was in the bill as passed by the Senate, and it was left unchanged by the Conference Committee.

During the time the section was before the Senate, considerable debate took place on whether or not the President was to consider transportation costs in his computations.¹⁸ But no accord was reached on the point, and no specific statement was included in the section as to whether they were to be considered or not in figuring costs of production. In fact, as will be pointed out below, it was not until the President, in 1925, called upon the Attorney General to advise him in this connection, that the issue was settled.

A later amendment provided for the elimination of the words "but in considering prices as factors in ascertaining differences in conditions of competition, only reasonable profits shall be allowed" in subdivision (c). This was made necessary because of the change, throughout the section, to the words "costs of production."¹⁹

The next amendment was directly related to the changes made with respect to cost of production. It concerned subdivision (c) and provided that, among the other things to be considered by the President in investigating the differences in costs of production, there should be added another group of items as follows: "Advantages granted to a foreign producer by

¹⁶ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11209.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, pp. 11209-11216.

¹⁹ *Ibid.*, p. 11228.

a foreign government, or by a person, partnership, corporation, or association in a foreign country." Mr. Smoot explained that such a provision would allow the President to consider such an item as the export bounties commonly given to German producers by the cartels in that country. Such a bounty could not be considered in ascertaining the costs of production, and if not provided for otherwise, might give the foreign producer a decided competitive advantage. This amendment was agreed to.²⁰

In the section as it came from the Finance Committee, the following words appeared in subdivision (e): "that no proclamation shall issue under this section unless reasonable opportunity shall be afforded to all persons directly interested in the production and distribution of such merchandise affected by such proclamation to be heard." In the revised amendment as offered by Mr. McCumber, these words replace the ones just quoted: "In any investigation under the provisions of this section, hearings shall be held and a reasonable opportunity to be heard shall be afforded."

Relatively early in the debate, Mr. Edge spoke in favor of the section, especially if the President, in his investigations, would be guided by some impartial body of experts whose duty it would be to seek trade and industrial facts rather than political ones, so often found to be the case when Congress acted upon proposed rates.²¹

Mr. Lenroot favored provision for an investigation by the Tariff Commission to precede the President's proclamations, and upon which data the President would base his action.²²

Subsequently, the following amendment was offered, the words to be inserted at the end of the first paragraph of subdivision (c) in place of the words: "In any investigation under the provisions of this section, hearings shall be held and a reasonable opportunity to be heard shall be allowed":

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Com-

²⁰ *62 Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11228.

²¹ *Ibid.*, Pt. 9, pp. 10143-10145.

²² *Ibid.*, Pt. 11, p. 11192.

mission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission is authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under this section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.²³

In connection with this amendment, Mr. McCumber stated that it was in line with a letter he had just received from President Harding in which he had asked that provision be made, specifically, for an investigation by the Tariff Commission which should precede, in every instance, his proclamation of a duty change under the section.²⁴

Mr. Fletcher did not like the way the Tariff Commission was given its power by the amendment, since he felt it might deny hearings altogether under the wording of the amendment as it then stood.²⁵

Whereupon, Mr. Reed offered an amendment to the committee amendment that the following words be stricken out of it as recorded above: "The commission is authorized to hold hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under the section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon." And in their place, to be put the following: "The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Such hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."²⁶

Mr. Reed claimed that under the original amendment, the

²³ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11229.

²⁴ *Ibid.*, p. 11229.

²⁵ *Ibid.*

²⁶ *Ibid.*, p. 11231.

commission could hold secret hearings, or none at all, or it could hear only one side.²⁷ The amendment, with the change made by him, was agreed to.²⁸

Mr. Jones then offered an amendment to the amendment just passed by which he desired the words "hearings and testimony" inserted after the word "findings" in the last sentence. This was, also, agreed to.²⁹

The Conference Committee, however, made two important changes in this amendment. They struck out the words: "Such hearings shall be public." and "The commission shall prepare its findings in the case of each proceeding under the section and the President shall make such findings, hearings, and testimony public as soon as practicable after the issuance of a proclamation under the provisions of this section."³⁰

Two other changes are to be noted in the evolution of section 315, with respect to Senate action. In the original draft of the section, the President was empowered to change not only the classification, but the rate of duty as well, (but by not more than 50 per cent of the rate set in the act) in order to effect equality of costs of production. He was, furthermore, empowered to change the form of duty, in order to effect the specified objective if he thought that the best action to take. This provision was left unchanged in the McCumber amendment except that it was specifically stated that the President did not have the power to change an article from the dutiable list to the free list or vice versa. But the Senate struck out the words "or forms of duty" after the word "classification."³¹ This meant that the President could not change an ad valorem duty to a specific duty or vice versa.

On August 11, Mr. Bursum offered the following amendment to the Senate: "Ad valorem duties shall not be changed to specific duties, nor shall specific duties be changed to ad valorem duties. This provision shall continue in effect and force until

²⁷ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11231.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 11232.

³⁰ *Ibid.*, p. 12456.

³¹ *Ibid.*, p. 11221.

November 30, 1924, and thereafter, no duties shall be changed except by the authority of Congress."³²

Mr. Bursum's amendment was offered on the same day as the Lenroot amendment, and he asked that it be placed at the end of the Lenroot amendment. He was called on a point of order that the Lenroot amendment had to be considered first and be disposed of before his could be taken up. Following the disposition of the Reed amendment, Mr. Bursum's amendment was called up. In defending it, he said that the new power given the President was justifiable only because of the existing world chaos, and that he saw it as an emergency measure. Thus, he felt it should be temporarily limited to two years, and then, if successful, it would be easy enough for Congress to continue it. Otherwise, it would lapse and occasion no embarrassment to Congress over its repeal. Upon being advised by Mr. McCumber that the Senate had already acted upon the question of disallowing the President the power to change the form of duty, Mr. Bursum agreed to withdraw the first part of his amendment. When the amendment came up for vote, it was passed by the Senate,³³ but the Conference Committee struck it out.³⁴

Three other changes were made by the Senate in the original committee amendment: that the expression "in the markets of the United States" be changed to read "in the principal markets of the United States"; that no action taken under the section could impose a duty upon any commodity higher than the maximum duty contained in Title I of the act, in the case of those commodities where Congress had so set a maximum duty; and that the provision for making operative the Dye Embargo Act of 1921 in the event conditions were found impossible of equalization by proceeding under the section as provided, be eliminated. These changes can be seen by comparing the texts of the Finance Committee amendment with that of the McCumber amendment, and in no case were any of these changes altered either by the Senate or the Conference Committee.

³² 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11201.

³³ *Ibid.*, pp. 11201, 11233, and 11236.

³⁴ *Ibid.*, Pt. 12, p. 12456.

The Conference Committee did, however, make two changes in the section as passed by the Senate. First, they inserted the words "in the United States and the principal competing country" after the word "production", in the first paragraph of subdivision (a). The effect of this was to restrict the President to the examination of costs of production in but one foreign country, and that one, the principal competing country.

Second, they struck out the word "sixty" in subdivision (a) and inserted the word "thirty". Thus, the President's proclamations were to become effective thirty days after issuance instead of sixty days thereafter.³⁵

In summarizing the changes made in section 315 by the Senate and the Conference Committee, the following are noted:

First, the words "costs of production" were substituted for the words "conditions of competition" throughout the entire section. This change, made by the Senate, was ratified in conference.

Second, the President was forbidden to change the form of the duty set in the act. This change, made by the Senate, was ratified in conference.

Third, in subdivision (b), the Senate gave the President power to change the dutiable base from foreign value to the American selling price if an increase in the duty up to 50 per cent on the former basis was incapable of equalizing costs of production, but such change in the dutiable base was to be available only to products mentioned in paragraphs 25 and 26 of Title I. The Conference Committee increased the availability of American valuation, under the conditions noted, to all articles in the act dutiable upon their value. The Conference Committee further provided that no duty increased by 50 per cent under subdivision (a) could, in addition, have its valuation base changed.

Fourth, by addition to subdivision (c) new elements were to be considered by the President in arriving at costs of production, namely, any advantage granted to a foreign producer by a foreign government, person, partnership, corporation, or association in a foreign country. This change, made by the Senate, was approved in conference.

³⁵ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 12, p. 12456.

Fifth, the Senate provided for an investigation by the Tariff Commission which was, in every case, to precede any action by the President. The commission was directed to give reasonable public notice of its hearings, and reasonable opportunity to all interested parties to be present, give evidence and be heard. These hearings were to be public, and the President was directed to make public all the findings, hearings, and testimony upon which he based his proclamation as soon after its issuance as was practicable. The Conference Committee altered this part of the section by striking out the words requiring the hearings to be public and by eliminating the requirement that the President make the findings, hearings, and testimony public as soon as practicable after the issuance of his proclamation.

Sixth, the Senate provided that the section should remain in operation for two years, after which time no duties were to be changed except by the authority of Congress. This provision was eliminated in conference.

Seventh, the Conference Committee amplified the section by providing that costs of production in the United States should be compared with costs in the "principal" competing country.

Eighth, the Conference Committee, further, changed the effective date of presidential proclamations from sixty to thirty days.

The Conference Committee report passed the House on September 15, the Senate, on September 19, and the bill was signed by the President on September 21.

The final form of section 315 follows:

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. 30 days after the date of such pro-

clamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila); Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon such proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective 15 days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivision (a) and (b) of this section, the President, insofar as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in the form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraphs no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at the time of entry.³⁶

³⁶ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XLII, Pt. 1, pp. 941-943.

IV

THE CONSTITUTIONAL QUESTION

The constitutional aspect of section 315, while debated at length in the Senate, was not finally settled until five years after the passage of the act.

The majority report, submitted with the Senate Finance Committee bill, paid scant attention to the question. It merely cited the case of *Field v. Clark*¹ as setting at rest any doubt as to the constitutionality of the section.²

Mr. Smoot's first speech in defense of the bill, provided a more extended presentation of the constitutional claims of the section. He pointed to section 3 of the Tariff Act of 1890 as a constitutional precedent.³ He drew the parallel between this section and section 315. He said the President's power, under section 3, was fourfold. First, he was to ascertain whether the laws of a foreign country imposing duties or other exactions upon American commerce were reciprocally unequal and unreasonable. If so, he was to suspend the provisions relating to the free introduction of the enumerated commodities when imported from such countries. Then, he was to apply the rates set by Congress in the latter part of the section, upon those commodities. Finally, he was to determine the length of time the law was to be thus suspended. In the *Field* case, which was the test case for this section 3, Mr. Smoot quoted Mr. Justice Harlan who spoke for the court, and said: "The Legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."

The speaker then cited a number of cases, all of which he held would affirm the constitutionality of section 315. Special mention was made of the Hepburn Act, wherein power was granted to the Interstate Commerce Commission to determine just and reasonable railroad rates, and which power was sus-

¹ *Field v. Clark*, 143 U. S. 649, (1891).

² *S. Rept.* No. 595, 67th Cong. 2nd Sess., p. 4.

³ *Supra.*, Chap. I, pp. 10-11.

tained by the Supreme Court.⁴ Finally, he emphasized the fact that the President's power was definitely limited by the terms of the section. He could only increase or decrease the prevailing rates to the extent of 50 per cent in order to satisfy the policy laid down by Congress, namely, to effect equality of competitive differences.⁵

The next four speakers on this point all favored the section and believed in its constitutionality, but Mr. Walsh, following them, held that the *Field v. Clark* decision afforded no justification for the proposed section. Section 3 of the 1890 Act had definitely provided the rates the President was to impose on goods, usually entered duty free, from such country or countries deemed to be practicing unequal discriminations against American commerce. He went on to say that the legislative power was exercised when Congress declared that the suspension should take place upon a named contingency. The President's act was merely to execute the will of Congress, and upon the suspension of free entry of the goods, all he did was to impose the duties specified by Congress. He concluded by saying that section 315 could only rest its constitutional claim on the *Field* case in the event Congress specified exactly what duties the President should proclaim when he found the prevailing ones ineffective in equalizing competitive conditions. Throughout, he objected to the fact that the President's actions would not be subject to judicial review, and that the rules for executive guidance were not clearly enough stated.⁶

Mr. McCumber and Mr. Smoot immediately rose to say that the limitations on the President's power were both clear and definite.⁷

Mr. McCumber, upon submitting his amended section to the Senate on August 10, spoke at considerable length on the constitutional point. He said that the section rested upon the powers of Congress to impose duties and to regulate commerce. He said that all agreed to the rule tersely stated in many legal

⁴ *I. C. C. v. Louisville and Nashville Railroad*. 227 U. S. 88, (1912).

⁵ *62 Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 6, pp. 5874-5881.

⁶ *Ibid.*, pp. 6493-6501.

⁷ *Ibid.*, pp. 6503-6509.

opinions to the effect that the legislature could not delegate its power to make laws, but that it could make a law to delegate a power to determine some fact or state of things upon which the law made or intended to make its own action depend. He, then, called attention to the power given the Secretary of War in section 18 of the Rivers and Harbors Act of 1899. When the Secretary shall have reason to believe it so, he is given the power to have any unreasonable obstruction to free navigation of navigable waterways of the United States removed or altered. The constitutionality of this section was upheld in the Union Bridge case,⁸ in which decision it was stated that "Congress when enacting that navigation be freed from unreasonable obstructions—may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule and of proclaiming the precise things to be done as a remedy therefor."

He next recited the main points of the Field case, and he held that the only difference between that case and the pending question was that Congress, in the latter connection, says, in effect: "You shall make the same investigation relating to inequality in competition and instead of fixing certain rates you shall fix a rate of duty that will equalize that competition; and if the rates which we provide do not fix that difference equally, you may increase those rates not to exceed 50 per cent or decrease them not to exceed 50 per cent, or if you have to proceed under subdivision (b) of section 315, under that standard, you may adopt the American standard of valuation and increase or decrease the rates not to exceed 50 per cent."⁹

Mr. Pomerene insisted that the rates the President was directed to apply in the 1890 Act were fixed while in the pending section, he was given discretion up to 50 per cent. Mr. McCumber replied that he was given no discretion; he must fix a rate which would equalize differences in competition. He then cited two more cases in point: *Butterfield v. Stranahan*,¹⁰ and *Monon-*

⁸ 204 U. S. 364, (1906).

⁹ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, pp. 11156-11158.

¹⁰ 192 U. S. 470, (1903).

gahela Bridge Company v. U. S.¹¹ He quoted section 805 of the Revenue Act of 1916, referred to above, as follows: "That whenever during the existence of a war in which the United States is not engaged, if the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency, contrary to law and the practices of nations, importation into their country of United States products, not injurious to health or morals is prohibited or restricted, the President is authorized and empowered to prohibit or restrict importation of their products for such period. The President may change, modify, or renew such proclamation at his discretion."¹²

Mr. McCumber thought of this section as in exact accord, legally speaking, with the active provisions of section 315, then being criticised as unconstitutional because of the insufficiency of the language therein made determinative of the President's action.¹³

An exhaustive brief on the subject, prepared by Judge DeVries of the Customs Court of Appeals, was next presented to the Senate. In upholding the constitutionality of the section, the brief included much of that which has already been given above. With respect to the President's actions not being subject to judicial review, Judge DeVries said: "Preclusively, it may be well to bear in mind that Congress itself, by this amendment, levies the duty in terms of facts or a state of things, and that the President merely executes the statute in the manner therein prescribed. Any judicial review, therefore, allowed or had of the findings of the facts or state of things and the equivalent duty proclaimed by the President, would be a review of a Congressional conclusion of fact fixing a duty. It seems trite to say that would be inhibited by the Constitution as an usurpation by the judiciary of the constitutional powers vested in Congress."¹⁴

Mr. Edge's statement was the last before the change made in the wording of the section. He thought the President's power

¹¹ 216 U. S. 177, (1909).

¹² *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XXXIX, Pt. 1, p. 798 f.

¹³ 62 Cong. Rec., 67th Cong. 2nd Sess., Pt. 11, pp. 11159-11162.

¹⁴ *Ibid.*, pp. 11162-11179.

was wisely given, and he observed that the Supreme Court could determine the constitutionality of the section if necessary, and if declared unconstitutional, Congress could then repeal it.¹⁵

The next move, in this connection, was the adoption of the substance of the Lenroot amendment in the form of a committee amendment, as noted above, by which the words "costs of production" were substituted for "conditions of competition." Following this, no further serious objection to the constitutionality of the section was voiced, and the section, subsequently, became law.

A test case, to finally decide the constitutionality of the section, was not unexpected, and in the so-called "Barium Dioxide Case", the Supreme Court settled the question. J. W. Hampton, Jr. & Co. had brought a shipment of barium dioxide into New York, and upon which the collector of customs levied a duty of six cents per pound. This duty was two cents a pound more than that set in the 1922 Act, the rate having been raised by the President on May 19, 1924, under section 315. A protest was made, and the case came up before the United States Customs Court. A majority held the act constitutional. Thereupon, the case was appealed to the United States Court of Customs Appeals. The Attorney General certified that, in his opinion, the case was of such importance that a review by the Supreme Court seemed expedient. Subsequently, the judgment of the Customs Court was affirmed, and on July 7, 1927, the petition to the Supreme Court for certiorari, filed May 10, was granted. The case was argued before the Court on March 1, 1928, and it was decided April 9, 1928.

Chief Justice Taft delivered the opinion of the Court. He, first, enumerated the two grounds upon which the petitioner rested his case. First, that section 315 was invalid because it constituted a delegation to the President of the legislative power, which by Article I, section 1 of the Constitution, is vested in the Congress, the power being that declared in section 8 of Article I, that the Congress shall have the power to lay and collect taxes, duties, imposts, and excises. Second, that the section was void

¹⁵ 62 *Cong. Rec.*, 67th Cong. 2nd Sess., Pt. 11, p. 11189.

because of its avowed intent of protecting the industries of the United States whereas the Constitution gives Congress the power to lay such taxes for revenue only.

The opinion went on to say that the intent of Congress in section 315 was clear, in that it desired to secure by law the imposition of customs duties on imported articles which should equal the difference between the cost of producing in a foreign country the article in question, and in laying it down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties would not only secure revenue, but at the same time enable domestic producers to compete with foreign producers on terms of equality in the markets of the United States. This difference was held to be difficult of determination, in some cases, but the difference sought, was held to be clearly defined in the statute and perfectly intelligible. Congress appeared to have recognized that the information in its possession was not sufficient to make this adjustment in every case, and in view of the changing conditions it foresaw cases where readjustment might be necessary. In order to avoid such difficulty, Congress, in section 315, defined clearly its intended policy, and then authorized a member of the executive branch to carry out that policy, namely, to find existing differences in domestic and foreign costs of production, and see to it that the duties would, at all times and in all cases, equalize those found differences. The President was given this power, and to help him, a body of experts was designated to gather data and ascertain facts in order to justify these readjustments.

The Tariff Commission, the opinion went on to state, was not in itself directed to set the duties, but it was directed to make an investigation before the President could act under the section, and in making such investigation, interested parties were to be notified, and given the chance to produce evidence, and be heard.

Mention was made of the cardinal points in the set-up of our governmental machinery, that there were the three branches: the executive, the legislative, and the judicial, and that no one branch is to invest itself with the powers of the other. Each branch was held to function as a part of the coordinated whole, and was to call upon the other two branches whenever necessary,

so long as the action invoked was not an assumption of the constitutional field of action of another branch. In determining the extent of assistance sought from the other branches, the decision went on to say, common sense and the inherent necessities of the governmental coordination should be the guides.

The field of Congress' action was pointed to as being highly involved, and thus, requiring that body, from time to time, to seek the assistance of the executive branch, within defined limits, in order to secure the exact effect intended by its acts. This assistance might be in the nature of interpreting the statute, directing the details of its execution, and even imposing penalties for the violation of such regulations.

The opinion next pointed out that the inability of Congress to determine exactly when its acts should become effective, because of their dependence on future conditions, might cause that body to leave the determination of such time to the decision of an executive.

An extract from the opinion of Judge Ranny of the Ohio Supreme Court, in *Cincinnati, Wilmington, and Zanesville Railroad Co. v. Commissioners*,¹⁶ was then given as follows:

The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid exception can be made.

The question of railroad rates was next mentioned. One of the functions of Congress is to regulate interstate commerce and the rates charged for the carriage of freight and passengers. Since the rates are myriad, if Congress were compelled to fix them all, the power could not be exercised. Common sense was held to warrant Congress' appointing a body, the Interstate Commerce Commission, to fix these rates, after allowing interested parties to give evidence and be heard. Such rates were to be fixed in accordance with the rule laid down by Congress that they be just and reasonable and not discriminatory. The court cited

¹⁶ 1 Ohio St. 77, (1852).

the cases of: *Interstate Commerce Commission v. Goodrich Transit Company*,¹⁷ and *State v. Chicago, Milwaukee, and St. Paul Railway Company*,¹⁸ in point. In the decision of the latter case, these words are found:

If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic.—Our legislature has gone a step further than most others and vested our commission with full power to determine what rates are equal and reasonable in each particular case. Whether this was wise or not is not for us to say; but in doing so we can not see that they have transcended their constitutional authority. They have not delegated to the commission any authority or discretion as to what the law shall be—which would not be allowable—but have merely conferred upon it an authority and discretion to be exercised in the execution of the law and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law and what it shall be. The commission is intrusted with no authority or discretion upon these questions.

It was conceded, by the counsel, that Congress might use the executive officers to apply and enforce a policy declared by it in a law, and that such acts of enforcement and regulation would be given the power of law. But this had never been done or permitted in connection with the power of Congress to levy taxes and fix customs duties. The authorities were held to make no such distinction. If Congress has the power to exercise its rate-making function in interstate commerce by declaring a rule which shall prevail in such rate-making, and then delegating the power, in its act, to a commission to fix the rates according to that rule, a similar provision for fixing the customs duties on imported merchandise was held to be justifiable. The legislative action of Congress in laying down an intelligible principle to which a person or body, authorized to fix rates, is directed to conform, is not a forbidden delegation of the legislative power.

¹⁷ 224 U. S. 194, (1911).

¹⁸ 38 Minn. 281, (1888).

The *Field v. Clark* case was cited in the Court's decision, and held applicable, in principle, to the pending case. Under the terms of the Act of 1890, the President, likewise, was held not to be exercising a legislative power, since Congress had determined, legislatively, that the suspension of the free entry of the goods named in section 2 should take place upon a named contingency; the determination by the President that the country or countries sending the United States those goods were subjecting American imports to reciprocally unreasonable and unequal duties or exactions. The President's action was merely to execute the will of Congress, not to make the law. He was to ascertain and declare the event upon which its expressed will was to take effect.

As to the second point in the case, the opinion stated that no historian would deny the fact that from the very earliest days of our country, Congress enacted tariff laws designed to not only produce revenue, but to vary the subjects of tariff duties so as to encourage home industry, and protect domestic production from foreign competition. In this connection, the second tariff act of the United States, passed in 1789, was cited. It read in section 1 as follows: "Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and for the encouragement and protection of manufactures, that duties can be laid on goods, wares, and merchandise imported—etc."

It was held, in the decision, that since many of the framers of the Constitution were in the Congress that passed that act, such contemporaneous legislation fixed the construction to be given its provisions. The title of the Act of 1922 was quoted wherein one of its provisions was set forth as being: "—to encourage the industries of the United States." Whatever was thought of the policy of protection, the Court was of the opinion that it could not be declared unconstitutional.

The opinion concluded that section 315 and its provisions were within the powers of Congress, and thus, the decision of the Court of Customs Appeals was affirmed.¹⁹

While other protests had been made upon this section, as a result of the Barium Dioxide decision, the Annual Report of

¹⁹ *J. W. Hampton, Jr. & Co., Petitioner v. U. S.*, 276 U. S. 394, (1927).

the Tariff Commission for 1929 indicated that most of the other cases had been or were being abandoned.²⁰

Six years after its enactment, section 315 was held constitutional by the Supreme Court. Therefore, any possible future abandonment of the flexible tariff must be an act of Congress, that body which gave its approval to the idea in 1922.

²⁰ P. 23.

V

PROCEDURE UNDER SECTION 315

Before turning to a consideration of what has actually been done under the operation of section 315, the procedure under the section as it was set up by the Tariff Commission will be, first, briefly considered.

The section provided that no proclamation was to be issued until an investigation had been made by the Tariff Commission. This investigation was to better enable the President to determine the differences in costs of production existing at the time the rate was being questioned. The commission was required to give reasonable notice of its hearings, and reasonable opportunity to interested parties to be heard.

In pursuance of the power given the President under the section (to make any needful rules or regulations in order to carry out the provisions), President Harding, on October 7, 1922, issued the following executive order:

It is ordered that all requests, applications, or petitions for action or relief under the provisions of sections 315, 316, and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such commission.¹

Following this and in pursuance of the law, the commission adopted and made public its relatively simple rules of procedure.

Any person, partnership, corporation, or association could make application for an investigation under the sections. No specific form was required for such application, but it had to be in writing and signed by, or on behalf of the applicant, and it had to contain a short and simple statement of the relief sought and the grounds therefor. No investigation was ordered upon an application unless the application or a preliminary investigation, undertaken after the receipt of the application, convinced

¹ *Sixth Annual Report of the U. S. Tariff Commission, 1922, p. 3.*

the commission that a more extensive investigation was warranted under the law. If the information contained in the application was found insufficient, the commission might permit the applicant to amend the application, or to submit additional evidence, either orally or in writing.

On April 21, 1923, a question arose concerning the power and authority of the commission under the Executive Order of October 7 in those cases where no application or petition had been filed. On April 21, after a conference with the commission, President Harding issued the following:

"Petitions and applications for the increase or reduction in rates are to be considered by the Commission in accordance with the Executive Order of October 7 to determine whether formal investigations are warranted. If the nature of the subject so requires, the Commission will exercise the power to limit the inquiry or broaden it to include related subjects. In cases where no petition has been filed, whenever a preliminary inquiry or survey discloses sufficient grounds, under the law, the Commission, after conference with the President, will order such formal investigation under section 315 as the facts may warrant and the public interest require. Each formal investigation, however, instituted will begin with an order giving public notice to all interested parties."

In addition to the rules of procedure above mentioned, the commission prescribed, by rule, a form of order instituting an investigation, and the mode in which notice of such investigation was to be made, namely, by posting a copy of the same for 30 days at the principal office of the commission in Washington, D. C., and at its office in the Port of New York, and by publishing a copy thereof for two successive weeks in "Treasury Decisions", published by the Department of the Treasury, and in "Commerce Reports", published by the Department of Commerce, copies of which publications were obtainable at all times from the Superintendent of Documents in the Government Printing Office in Washington. The order thus published contained a notice that parties interested would be given an opportunity to be present, to produce evidence, and to be heard at the office of the commission on a date to be fixed thereafter. This fixed date was then to be given thirty days' public notice by

publication in "Treasury Decisions" and "Commerce Reports". When the investigation was sufficiently advanced, a formal public notice of a hearing was issued, stating, specifically, when and where the interested parties were to be given the opportunity to be present, produce evidence, and be heard. The notice of the public hearing was to be published in the same manner as the notice of the order instituting the investigation. The hearing held in accordance with this procedure constituted the final public hearing in each case at which the interested parties were to have an opportunity to present their respective contentions, orally or in printed briefs. Occasionally, the order for a public hearing was accompanied by a notice fixing the date thereof, instead of having the date of the hearing fixed some time after the announcement of the institution of an investigation. These hearings were to be, obviously, preliminary in character, since they were to be held before the field work had been completed. They were chiefly to show the interest in the investigation, and to elicit information from interested parties, especially with respect to the proper scope of the inquiry, and the methods to be adopted.

Section 315 stated that investigations were to be instituted only in case they were in the public interest, and for the general public benefit, and in no case were they to be undertaken for purely private parties or interests. Thus, it followed that the application for duty or classification changes submitted by private parties, first of all, had to be very carefully scrutinized. An investigation under the section did not follow the submission of an application as a matter of course. The application was intended merely to draw the attention of the commission to an alleged case wherein the existing duty did not equalize foreign and domestic costs. The commission, therefore, worked out a method of procedure for handling all applications which came to it. After being duly recorded and noted in the office of the chairman, the application was to be submitted to the chief economist, who, after noting its contents, and the action requested, was to send it to the appropriate expert for a preliminary report, after having added to it whatever comments he deemed necessary. Usually, the expert was the head of the commodity division

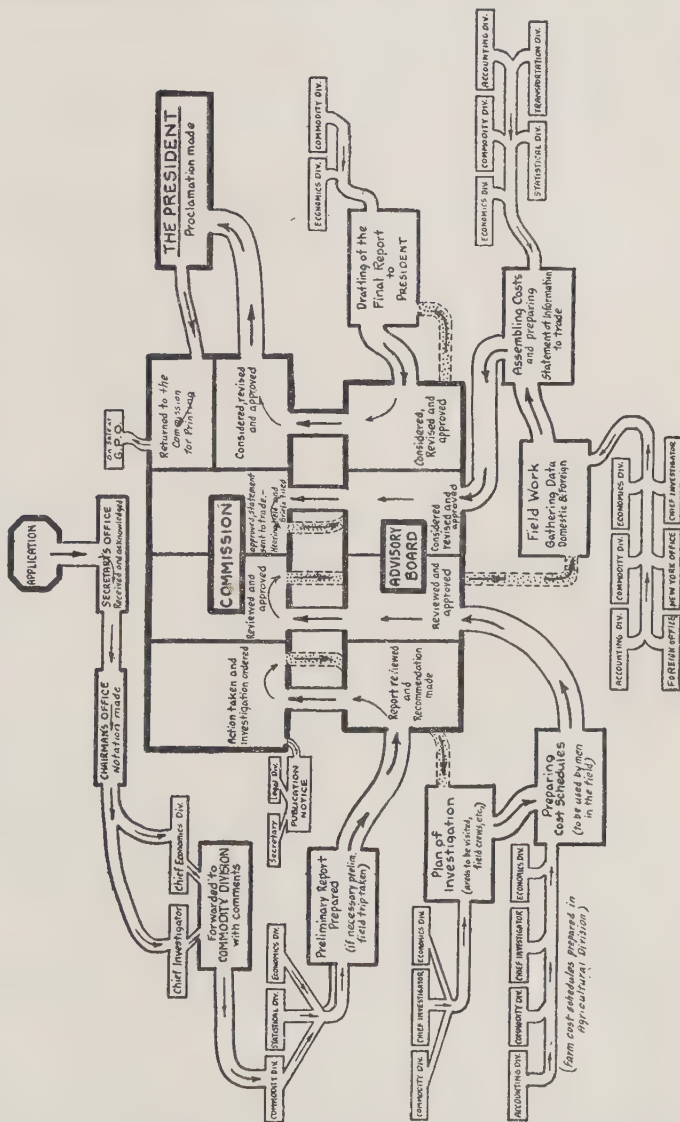
under which the subject of the application naturally fell. Sometimes he felt the need for help in the preparation of the preliminary report, and in such cases, a member of the economic staff was to be detailed to him for that purpose. In the preparation of the preliminary report, the expert was to survey all available, relevant material existent in printed form, as well as the mass of manuscript material in the files of the Tariff Commission. The statements of the applicant were to be very carefully examined and checked, and if necessary, field work was to be undertaken to get the most recent data possible with respect to foreign and domestic costs, prices, and so forth.

The preliminary report, when completed, was to be submitted to the chief investigator for examination and review. If he thought the report sufficient to warrant the institution of an investigation, he was to send it to the Advisory Board. When considering a preliminary report upon an application, the Advisory Board usually was to consist of the chief economist, the chief investigator, the chief of the legal division, the chief of the commodity division embracing the commodity under consideration, the economist, if any, who had assisted in the preparation of the report, and one other economist. The Advisory Board then, was to examine the preliminary report in detail, and subsequently report its views to the commission. If there was dissent in the Board, each member was to be requested to present, in writing, his views upon the application. It was largely upon these data that the commission would determine whether or not an investigation was to be ordered.

The commission's regulations provided that whenever an investigation for the purposes of section 315 was ordered, a plan of the investigation and the estimated cost thereof, was to be prepared by the chief investigator and the appropriate experts, and submitted to the Advisory Board for its consideration and approval. Such a plan was to indicate the nature and extent of the services needed of the Commodity, Accounting, Economic, and Legal Divisions. After the Advisory Board approved the plan, it was to be submitted to the commission, and upon its approval of it, it was to become the basis for the investigation. The chief investigator was to be advised, in

writing, to proceed in accordance with the plan, and the administration of the plan was to become his duty. The next step was the undertaking of domestic and foreign field work, which was to include the preparation of cost schedules, usually in cooperation with those who had practical knowledge of the industry concerned. These schedules were very carefully drawn in the light of accounting experience, and usually were very detailed. The practice of the commission was to have these cost figures checked back to the books of the producers themselves. The collection of foreign cost data was more difficult. Some foreign producers made their books available to the agents of the commission, and assisted in the preparation of the cost schedules. In other cases, all cost data were refused. In still other cases, general figures were given, but the details withheld. In addition to the cost prices, the agents were to collect all the price figures of the commodity being investigated. Wage data were to be collected, and any other data which might come within the provisions of subdivision (c) part 4 of the section: "any other advantages or disadvantages in competition." Analysis was then to be made of the prices of competing imports, and the records of the customs houses were to be examined in this connection. After the collection of such data, they were to be tabulated and subjected to analysis and scrutiny at the office of the commission in Washington. Bearing in mind the statutory prohibition against disclosures of trade secrets or processes, a tentative summary of the results was to be made and submitted to the interested parties.

When the data so collected were found to be sufficiently complete, a date was to be set for public hearings, and formal public notice to all interested parties was to be given thirty days in advance thereof. At this hearing, all interested parties were again to be given the opportunity to produce evidence, and be heard, and a careful record of the testimony given, was to be kept. At the close of the hearings if the parties did not agree to present their arguments, a subsequent date was to be set for filing briefs and for oral argument. After the hearing was completed, all the available data and pertinent information were to be collected and formulated into a report which, after approval



by the Advisory Board, was to be submitted to the commission. From this, the commission was to prepare its report to be sent to the President for his action.²

This chart shows the procedure followed under section 315.³

In addition to the above-outlined procedure, a few other rules and regulations might be included at this point.

Witnesses and Subpoenas.—Witnesses were to be examined orally unless the commission ordered otherwise. Witnesses and the production of documentary evidence might be required from any place in the United States at the designated place of hearing. Subpoenas might be signed by any member of the commission and such members, or agents designated by them, might administer oaths and affirmations, examine witnesses, take testimony, and receive evidence. Testimony taken by deposition might be ordered by the commission at any state of any proceeding or investigation, such depositions to be taken by any person authorized by the commission who had the power to administer oaths. Such testimony was then to be reduced to writing by the person taking it or under his direction, and was then to be submitted to the deponent for subscription. Any person, firm, corporation, or association might be compelled to appear, to depose, and to produce documentary evidence, in the same manner as witnesses might be so compelled.

Witness fees and mileage.—Witnesses who might be summoned before the commission were to be paid the same fees and mileage as were paid to witnesses in the United States' courts. Witnesses whose depositions were taken, and the persons taking them, unless they were in the employ of the commission, were to receive the same fees and mileage as were paid for like services in the courts. Witness fees and mileage were to be paid by the party at whose instance the witness appeared.⁴

Finally, investigations authorized under the section might be instituted if the application submitted by a person, partner-

² U. S. Tariff Commission, *Dictionary of Tariff Information*, *op. cit.*, pp. 333-335.

³ *Twelfth Annual Report of the U. S. Tariff Commission, 1928*. Chart faces p. 9.

⁴ *Sixth Annual Report of the U. S. Tariff Commission, 1922*, pp. 64-66.

ship, corporation, or association, was deemed sufficient by the commission. Also, investigations could be undertaken if the President so requested, and in the case of a Congressional resolution calling for the same. The power of final action rested with the President, and the commission was to act, throughout, solely in the capacity of a fact-finding body.⁵

⁵ *Twelfth Annual Report of the U. S. Tariff Commission, 1928*, p. 6.

VI

OPERATION OF SECTION 315

It is not unexpected, that in the administration of laws, difficulties will be experienced. Only by administration, and occasionally by court decision, will the full extent of the statute, its strength and weakness, become known. Section 315 proved to be no exception in these respects. In an earlier chapter, the care with which the section was drafted, was noted. Nevertheless, when it was placed in operation, several fundamental difficulties were early and continuously met. It can be safely held that at least some of these were due to the fact that this section was an innovation, not only in American, but in world tariff legislation. There was no precedent to guide Congress, nor could all the difficulties of enforcement be anticipated by that body at the time the section was being framed. Only in operation were these defects brought to light.

While practically all of the investigations, undertaken by the Tariff Commission under the section, presented individual difficulties, yet a classification of them was made by the body as early as 1924. A more recent classification is inclusive and well adapted to use here. It is proposed to adopt this, and fill in the specific investigations wherein these difficulties were met, in order to show how these were handled, and to see if there was consistency in the treatment of essentially similar problems.

The classification found in the *Thirteenth Annual Report of the Tariff Commission*, published in 1929, is as follows:

Difficulties in: (1) determining the principal competing country, (2) securing domestic and foreign costs of production, (3) determining the comparability of domestic and foreign products, (4) transportation costs, and (5) determining the principal market or markets in the United States where such costs were to be equalized.¹

These were not arranged in order of their importance, nor according to their degree of difficulty, but rather did this par-

¹ *Thirteenth Annual Report of the U. S. Tariff Commission*, 1929, p. 17.

ticular grouping reflect the order in which the difficulties were ordinarily experienced in a given investigation.

(1) *Principal Competing Country*

In the majority of the investigations made under section 315, the Tariff Commission had little or no difficulty in determining the principal competing country. However, there were several instances in which difficulties arose in this connection.

In the sodium nitrite investigation, the figures showed that in 1922, imports of that product from Germany were slightly more than those from Norway. In 1923, the two countries changed places. No reason was given by the commission for its selection of Norway as the chief competing country, but in the latter part of its report to the President, a possible explanation is noted. After having investigated both German and Norwegian costs, it was found that the latter were the higher of the two. Also, it was found that even if the duty were increased to the maximum extent (50 per cent of the duty set in the act) such increased duty would still not effect equalization of domestic and foreign costs. Thus, since the maximum duty was warranted against Norway, it was not necessary to consider the even lower German costs, else a still greater unequalizable cost difference would be found.² Regardless of which country was selected for the purposes of the section, the same action was warranted on the part of the President.

In the butter investigation, cost data were secured for the farm accounting year 1923-1924, when Denmark was found to be the chief competing country. However, before the war, it was found that imports from Canada exceeded all others, but that from 1920 to 1924, these had decreased both relatively and absolutely, while those from Denmark had shown a marked increase. In 1925, Denmark fell to third place after Canada and New Zealand, respectively.

The majority of the commission favored the selection of Denmark, holding that its imports entered, *en masse*, into the chief butter market of New York, and thus furnished a compet-

² U. S. Tariff Commission, *Sodium Nitrite*, (Government Printing Office, Washington, 1924), pp. 4 and 7.

itive impact which was not present in the case of Canadian butter, which entered the United States at many places widely scattered over the entire border. It was found, also, that half the New Zealand exports were sent to Hawaii, and the remainder entered Pacific coast markets, and so had little effect upon butter prices in New York. Finally, they held that the Danish imports were of an uniformly high grade, were easily marketable, and that their price was the price to which practically all the other butter in the New York market adjusted itself.

Vice-Chairman Dennis dissented from the majority report. He held that even though Denmark was the principal source of imports in the year for which costs were collected, that in the later year of 1925, Denmark's loss of first place was due to its recovery of the German market which had been in chaos in 1923, and which in turn had forced it to resort to increased shipments to the United States. He felt the 1925 conditions were indicative of the future, wherein the industrial and near-by markets of England and Germany would serve to take an ever increasing share of the Danish product. Thus, the American market would be of diminishing importance. He concluded that Denmark was no longer either actually or potentially the principal competing country.

The majority of the commission filed a second statement in answer to Mr. Dennis' objections to their choice, in which they pointed out his failure to give proper regard to the concentration in the entry of the Danish butter, and to note the abnormality of the year 1925, in which imports from all countries, except Canada, had decreased, while domestic production had materially increased. They further pointed out that modern transportation facilities provided refrigeration for the successful carriage of perishable products to practically all parts of the world. Also, with the growth of imperial preference, important and increasing competition was already being afforded Danish butter in the British market. This, together with the tariff placed upon imported butter by Germany, effective October 1, 1925, would likely increase the attractiveness of the American market instead of decreasing it.

Commissioner Costigan also filed a dissenting opinion, in

which he urged the investigation be reopened for the purpose, among other things, of securing additional data on Canadian and New Zealand costs.

It remained for the President to decide which country should be selected as the chief competitor, and in his proclamation changing the duty on butter, he accepted Denmark as such.³

That investigation seems to have established two precedents. In the first place, a country was selected as the chief competing country which was really such, during the period for which costs were taken. In the second place, the appearance of later data tending to overthrow the selection of that country were carefully considered, but they were not felt to warrant any change in the selection. The majority of the commission and the President, presumably, were convinced that the conditions in 1925 were neither normal nor likely to continue. They were looking both forward and backward in determining which country would likely be, normally, the chief competitor. They were disposed to take the long-time view of the problem, in order to make a selection best suited to the purpose of properly administering the selection.

Much the same situation developed in the pig-iron investigation. When the statistics were studied, it was found that in 1922, Great Britain furnished over half the imports; in 1923, it still held first place but with a reduced percentage of total imports. In 1924, India acceded to first place. In 1925, India's share had further increased, and Great Britain's had further decreased. During the first ten months of 1926, Germany held first place, Great Britain second, while India fell to third place. Cost data were collected for 1924 when India ranked first.

The commission suggested three possible explanations for the change in the 1926 line-up. The coal strikes in Great Britain might be assumed to account for the loss of some of the British trade to Germany. The effect of the Treasury decision, on April 6, 1926, to suspend further liquidation of Indian imports until investigation could be made of the alleged charge of Indian pig-iron dumping in the United States. On October 11, the Treasury

³ U. S. Tariff Commission, *Butter*, (Government Printing Office, Washington, 1926), pp. 13, 15-16, 59, 61-62, 70-73, 75-79, 142.

Department advised customs officials that it had been unable to substantiate the charges, and that liquidations should be resumed. Finally, the commission felt the organization of various units of the German iron and steel industry into cartels for the purpose of increasing export trade, might have effected an increase in German imports. Furthermore, it was noted by the commission, that regardless of which country's costs were taken, the maximum increase in duty was warranted.

Commissioner Costigan claimed that even though it made little difference in effect as to which country was selected, it was the duty of the commission to "affirm the existing competitive priority of Germany."

The President accepted India as the chief competing country.⁴ India was so selected, apparently, because it was the chief competing country in 1924, when the cost figures were collected, and that later changes did not appear to effect a permanent change in its position.

The method used in the butter and pig-iron investigations relative to the selection of the chief competing country, was followed in the six ensuing investigations, when similar conditions prevailed.

The investigations upon cresylic acid, phenol, and fluorspar can be considered together. In each of these, Great Britain had traditionally been the chief source of supply, but in each case, it was supplanted by another country in 1926, the year of the coal strikes in that country. Thus, since the first two are coal-tar products, it was thought that that country would recover its leadership as soon as the effects of those strikes had passed. In the case of fluorspar, the maximum duty increase was warranted whether British or German costs were taken, so the choice was immaterial. In each instance, however, the choice of Great Britain as the chief competing country has been made because of the feeling that, normally, that country would be the chief source of imports.⁵

⁴ U. S. Tariff Commission, *Iron in Pigs*, (Government Printing Office, Washington, 1927), pp. 1-2, 8-9, 29, and 38.

⁵ U. S. Tariff Commission, *Cresylic Acid*, (Government Printing Office, Washington, 1927), pp. 5-6 and 16; *Phenol*, (1928), p. 5; *Fluorspar*, (1928), p. 18.

In the potassium permanganate investigation, the situation was the same except that Germany's lead had been taken from it in 1925 by Czechoslovakia. But the commission looked at Germany's primary position in 1924, 1926, and 1927, and so selected it as the chief competing country.⁶

In the onion investigation, it was found that Spain had supplied approximately twice the volume and value of imports from September, 1922, through September, 1928, as that received from the next country, Egypt, with the exception of the shipping season 1927-1928. As the abnormally low level of imports from Spain in that period was found due to a temporary crop shortage, Spain was taken to be the chief competing country.⁷

Finally, in the linseed oil investigation, it was found that most of the imports from 1919 to 1925 had come from the United Kingdom. Dutch imports, however, almost equalled those from the United Kingdom in 1925, and following that year, the Netherlands was found to be the chief source of imports, up to and including 1928. The commission found that: "In the Netherlands, production and net exports of linseed oil have increased, whereas in the United Kingdom, production and net exports of linseed oil have decreased. This lends support to the belief that the Netherlands will continue to be the chief source of linseed oil into the United States. The Netherlands is taken as the chief competing country for the purposes of this investigation."⁸

When unmanufactured granite was being investigated, it was found if volume statistics were taken, Canada furnished more imports than any other country. However, upon analysis, it was found, that a large part of the Canadian imports was of low unit value granite, not comparable to the imports from the other principal sources of supply, and not comparable to the bulk of domestic unmanufactured granite. Thus, imports were con-

⁶ U. S. Tariff Commission, *Potassium Permanganate*, (Government Printing Office, Washington, 1928), p. 5.

⁷ U. S. Tariff Commission, *Onions*, (Government Printing Office, Washington, 1929), p. 11.

⁸ U. S. Tariff Commission, *Linseed Oil*, (Government Printing Office, Washington, 1929), p. 12.

sidered on the value rather than the volume basis, and Sweden was chosen the chief competing country.⁹

Prior to the war, Germany had been the chief source of diethylbarbituric acid imports. During the war, the trade-mark under which the German product had been sold in the American market was confiscated by the Alien Property Custodian, and the right to produce under the German patents was given to three American firms. Following the war, competition became severe. The investigation revealed that the principal competing country could not be determined, directly, since this acid was not specifically provided for in the 1922 act, and thus, complete import figures were not obtainable. The commission, therefore, studied an incomplete group of twenty-eight invoices during the period from the latter part of 1922 to August, 1923, and from them, found that Switzerland had furnished eighty per cent of the American imports. That country was therefore selected the chief competing country.¹⁰

In the potassium chlorate investigation, it was found that the American market had been divided between German and French producers on the basis of 62½ per cent and 37½ per cent, respectively. Germany, therefore, was the chief competing country.¹¹

In the other 315 investigations, the selection of the chief competing country gave the commission no particular trouble.

In summarizing the results of this study of the difficulties encountered in selecting the principal competing country, two observations can be made. First, in those cases, where one country led in the import trade for a part of the time and another country, for the rest of the time, which one was to be chosen? The commission established, apparently, a definite policy in this respect, which met with presidential approval in each case. The interpretation given the words "principal competing country" was not that the country chosen be the chief competing

⁹ U. S. Tariff Commission, *Granite*, (Government Printing Office, Washington, 1929), pp. 48-49.

¹⁰ U. S. Tariff Commission, *Diethylbarbituric Acid*, (Government Printing Office, Washington, 1925), pp. 48-49.

¹¹ U. S. Tariff Commission, *Potassium Chlorate*, (Government Printing Office, Washington, 1925), pp. 2-3.

country at the time the duty change was made, but rather, that the country chosen was the one it was felt would be such under normal, long-run conditions. This construction of the statute tended to eliminate the possibility of the section being used in an emergency sense. Instead, it was to be used as a means of providing rate changes which would reflect normally existing conditions, whether those existed at the time the rates were changed or not.

The second inference can be drawn from the potassium chlorate investigation. If foreign producers divide the American market, it is entirely possible that the costs of the country sending the larger amount of imports, would be higher than those in the country supplying the remainder. The country, thus, with the higher production costs would have been taken as the chief competing country, and this would have, in turn, played still further into the hands of the country with the lower costs, to the competitive disadvantage of the domestic producers. And the profits of the second country might even have been shared with the first country as is often done in cartel arrangements. This might have served to defeat, in part, the intent of the section, and thus have made advisable, on the part of the commission, the consideration of the costs of more than just the principal competing country.

(2) Domestic and Foreign Costs

In the administration of this part of the section, the commission found the greatest difficulty.

It might be logical, at this point, to briefly review the provisions of the section guiding the commission in the determination of such costs. In subdivision (a) of the section, it was simply stated that if the President, after an investigation, found that domestic and foreign costs of production were not equalized by the existing duty, he was to change the rate, within the limits set, in order to effect such equalization. In case such equalization could not be accomplished by changing the rate computed on the foreign value of the imported article, he was allowed, in subdivision (b), to change the valuation basis to the American selling price, without any change in the duty. In subdivision (c),

the commission and the President were given certain elements to consider in determining costs of production. They were not required to consider these; they were merely suggestions. These elements were four in number: (1) differences in the conditions of production, including wages, costs of materials, and other items in costs of production of such or similar articles in the United States and the competing country, (2) differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States, (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country, and (4) any other advantages or disadvantages in competition.

The terms of the section, for this purpose, were therefore obviously sweeping but indefinite, and most of the difficulty arose in deciding whether this or that element could be considered as legally falling under some one of the four categories noted above.

While the cost difficulties experienced by the commission were usually closely related to one another, for a clearer presentation, it seems logical to separate them into the following sub-groups: (1) the selection of the period for which costs were to be studied, (2) the determination of the average to be used, (3) the problem of domestic cost collection, (4) the problem of foreign cost collection, (5) the problem involved in the so-called "other costs," (6) the exchange problem, (7) the problem of a plant operating under capacity, (8) the problems created by joint and by-products.

(a) *Selection of the Period to be used*—In the first report sent to the President, on wheat and wheat products, this problem arose. The commission had two alternatives: to use the single year 1923, or to use the three year average costs of 1921-1923.

The commission pointed out that 1923 was a year of great variation as concerned wheat production. Hot winds were experienced in some growing sections, early frost in others. Unusually severe inroads of black-stem rust and grasshoppers caused the per acre yield in some of the Northwestern states to be lower than it had been for several years. On the other hand, production per acre in the Canadian provinces of Alberta and

Saskatchewan was unusually high in 1923. In comparing the two areas studied, it was found that for the 881 farms in the United States, the 1923 yield per acre was ten per cent less than the average for the three years 1921-1923, while in Canada, for 951 farms, it had been 8.7 per cent more. The commission's report concluded by saying that if the intent of the flexible provision was that rates should be adjusted often, perhaps annually, then the 1923 costs would be the indicated choice.¹²

The commission was divided upon this point. Commissioners Marvin, Burgess, and Glassie held that 1923 should be the year taken, since adjustments to meet changing conditions were what they felt section 315 contemplated. They pointed out that the most contemporaneous data should be those used, especially since, in this instance, the average costs for 1921-1923 had been largely derived from the 1923 figures. In conclusion they felt the rates set in the act were intended to generally prevail, and that their duty was to change these up and down to reflect currently existing abnormality. And that when such abnormality had passed, the rates set in the act should be returned by a termination of the rate previously proclaimed by the President.¹³

Commissioners Culbertson, Lewis, and Costigan desired the use of the three year period. They held that section 315 looked to the future, and that no one year, characterized by extreme variations especially, should be taken as a basis for findings for the future. They felt that it was necessary in the case of a product like wheat, to select a sufficiently long period to absorb "in the general averages, the accidents of production." Following this, they quoted a memorandum sent to the President, at the outset of the investigation, signed by all the members of the commission, in which it was stated that the investigation should cover a period sufficient to indicate advantages and disadvantages in competition which the duty was assumed to measure and equalize. The use of 1923 costs, they felt, would prove futile for the present emergency, since it would be useless for determining what, if any, duty would be normally required to equal-

¹² U. S. Tariff Commission, *Wheat and Wheat Products*, (Government Printing Office, Washington, 1924), p. 6.

¹³ *Ibid.*, pp. 28-29.

ize the differences between foreign and domestic costs. Also, they argued, if the duty were to be changed to correct the accidents of production in a given year, could this be done soon enough to benefit the American producer during the existence of the emergency? All in all, they did not favor the use of section 315 as an emergency measure.¹⁴

The President accepted the three year average.

The issue met in this first investigation in connection with what period was to be used, has already been noted above, to wit, was the section to correct immediately existing conditions, or was it to be exercised to cover normal, long-run conditions, likely to prevail in the future? The latter interpretation was the one sanctioned by the President, evidently, in the first investigation.

A similar situation developed in the methanol investigation, whether costs were to be taken for 1924, or for 1924 and the first six months of 1925. No decision had to be made in this case since the maximum increase in duty was warranted in any event.¹⁵

In the barium carbonate investigation, average costs were taken for the two years 1924 and 1925 for both foreign and domestic producers.¹⁶ Costs of sodium silicofluoride were taken separately for 1924 and 1925, but, again, no decision on this point was necessary, since the maximum duty increase was warranted whichever year's costs were taken.¹⁷

In the cast polished plate glass investigation, Commissioners Marvin, Brossard, and Lowell were of the opinion that average costs should be used for the years 1923-1925, rather than costs for only 1925. They held that 1925 was not a representative year either in the United States or in Belgium, the chief competing country, as far as this commodity was concerned. Costs in Belgium were found to be higher in 1925 than in 1923 or 1924,

¹⁴ U. S. Tariff Commission, *Wheat*, *op. cit.*, pp. 37-39.

¹⁵ U. S. Tariff Commission, *Methanol*, (Government Printing Office, Washington, 1926), p. 26.

¹⁶ U. S. Tariff Commission, *Barium Carbonate*, (Government Printing Office, Washington, 1928), p. 14.

¹⁷ U. S. Tariff Commission, *Sodium Silicofluoride*, (Government Printing Office, Washington, 1928), p. 17.

or for the three years, 1923-1925, while, correspondingly, they were lower in the United States.

Two reasons were given for their choice of the three year average as the cost period best suited for use. In 1925, production was unusually large in the United States and unusually small in Belgium, a condition directly affecting production costs, which were, therefore, not normal. The second reason had to do with repairs and maintenance. Such costs were lower in the United States in 1925 than for either of the other two years, whereas the three year average was held to be a more normal figure. In Belgium, the reverse was true with respect to 1925. In conclusion, they favored the weighted average costs for the three year period, since it allowed for the abnormal conditions of 1925, and "more nearly tends to equalize differences in costs of production not only for the period covered—but for the present time."¹⁸

Commissioners Dennis, Dixon, and Clark held that an average was always to be preferred to one year's costs unless there would be included therein, one or more abnormal years. They urged duty changes which should look to the future and reflect normal conditions. Therefore, they wanted the 1925 costs taken, since they felt they were more likely to be representative of the future. They cited the fact that Belgian exchange was more nearly normal in 1925 than it had been in 1923 or 1924. Also, new processes of production were being used in both countries, and by 1925, these had been removed further from the condition of experimentation. The extension of such processes would likely make distant past costs even more unrepresentative of future ones. While glass made by this new process was not included in the cost study, there were indications that an increasingly large portion of domestic glass would be made, in the future, by the so-called continuous process.¹⁹ However, the President accepted the average costs.

In the peanut investigation, costs were averaged over two

¹⁸ U. S. Tariff Commission, *Cast Polished Plate Glass*, (Government Printing Office, Washington, 1929), pp. 28-32.

¹⁹ *Ibid.*, pp. 36-38.

years,²⁰ and the same was done in the case of flaxseed, presumably because a severe drought had occurred in one of the two years which greatly reduced the Dakota yields.²¹ Two year average costs were likewise taken for linseed oil.²²

A different phase of this same problem presented itself in the sugar investigation. Cost data were collected for a six year period from 1917 to 1923 in order to take care of the unusual degree of cost fluctuations which were thought existent in the production of this commodity. Commissioners Marvin and Burgess strongly objected on the ground that the use of such an extensive cost period would necessitate the use of figures collected in different ways, at different times, and with varying degrees of authenticity. Also, those six years included the highly abnormal war period, with the decided change in the purchasing power of money. But a more important objection was to the effect that the 1917 to 1922 cost data were in the commission's files, and were available to Congress at the time it was setting the sugar duty for the 1922 act, and that any further use of them for a duty change under section 315 would be tantamount to a review, by the commission, of that act of Congress. It was felt changes of duty under the section should not make use of costs prior to 1922.²³

Since the President did not make any duty change on the basis of the sugar report, it is impossible to derive a precedent on this point. In no other rate investigation acted upon by the President, were data collected for years prior to 1922.

The next phase of this problem arose first, in the egg investigation, and had to do with whether or not an average of costs should be used, or costs for a single year. This investigation did not quite parallel the earlier ones on substantially the same point, wheat, glass, and so forth, since here the choice was between: an average of costs for the three years, 1926-1928, or

²⁰ U. S. Tariff Commission, *Peanuts*, (Government Printing Office, Washington, 1929), p. 66.

²¹ U. S. Tariff Commission, *Flaxseed*, (Government Printing Office, Washington, 1929), pp. 18, 36, 42, and 64.

²² U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, pp. 46-47.

²³ U. S. Tariff Commission, *Sugar*, (Government Printing Office, Washington, 1926), pp. 76-80 and 112-117.

costs for any one of the three years, not particularly the last of the three years, as was the case with wheat and the others. And the commission chose to take the 1926 (the first year) costs, as they believed them more nearly representative of normal conditions.²⁴

Another aspect of this same question had to do with those cases where costs were collected for a certain period, and subsequently, more recent figures became available before the commission's report was ready for the President. The question arose as to whether or not the commission should notice the new data. The paint brush handles' investigation is one in point. Costs were collected for 1922. In December, 1925, the commission was preparing its report for the President, and it was asked whether costs might not have changed in the meantime. The commission, therefore, ordered additional data collected, but after consideration of them, it stated that while some changes had taken place, they were not "statistically significant."²⁵

Cresylic acid and phenol costs had been collected for 1923, while the reports on them were not ready for the President until June and October, 1927, respectively. In both cases, later costs were examined, but no changes seemed warranted.²⁶ The magnesite, barium carbonate, and taximeter costs were, likewise, checked with later data, and the original costs left unchanged.²⁷

Still another phase of this problem came up in the taximeter investigation. Commissioner Costigan urged that the German cost data used were largely obsolete, and had not been verified by later data. They were gathered in 1923 when German money was highly inflated, and were being presented to the President two years later.²⁸ Commissioner Dennis felt that 1926 potassium

²⁴ U. S. Tariff Commission, *Eggs and Egg Products*, (Government Printing Office, Washington, 1929), p. 34.

²⁵ U. S. Tariff Commission, *Paint Brush Handles*, (Government Printing Office, Washington, 1926), pp. 14-17.

²⁶ U. S. Tariff Commission, *Cresylic Acid*, *op. cit.*, p. 14 and *Phenol*, *op. cit.*, p. 10.

²⁷ U. S. Tariff Commission, *Magnesite*, (Government Printing Office, Washington, 1928), p. 15 and *Barium Carbonate*, *op. cit.*, p. 16, and *Taximeters*, (Government Printing Office, Washington, 1926), p. 18.

²⁸ U. S. Tariff Commission, *Taximeters*, *op. cit.*, p. 9.

permanganate costs were out of date in 1928.²⁹ Commissioners Dennis and Costigan declared the cost data for cotton gloves and cotton fabrics out of date.³⁰ Commissioner Costigan, likewise, characterized the foreign print roller cost data as obsolete.³¹

A final aspect of this problem had to do with whether or not the identically same period should be taken for both foreign and domestic costs, or whether reasonable variation was either justifiable or desirable. The following cases, where identical cost periods were not taken, are in point.

Domestic costs for barium dioxide were taken for 1922, and compared with German costs for June, 1923 and March, 1924.³² In the oxalic acid investigation, domestic costs for the first quarter of 1923 were compared with German invoice prices for the period January to October, 1923.³³ German taximeter costs were taken as of December 1, 1923, and were compared with two domestic cost figures, one for six months, and the other for twelve months ending in 1923.³⁴ Also, in the print roller investigation, the period of domestic and foreign costs differed³⁵ as was, likewise the case in the methanol investigation.³⁶

In explanation of the barium dioxide case, the commission was unable to get German cost data other than those for the periods mentioned. No explanation, however, was given as to why it did not compare the German data with domestic data for the same period. In the oxalic acid investigation, German costs were refused, and invoice prices had to be used as evidences of costs. The American cost period was included in the longer German cost period. The same situation was existent in the methanol investigation. In the taximeter case, German costs were obtainable only for December 1, 1923, because of a change

²⁹ U. S. Tariff Commission, *Potassium Permanganate*, *op. cit.*, pp. 11-12.

³⁰ U. S. Tariff Commission, *Cotton Warp-knit Fabric Gloves and Cotton Warp-knit Fabric*, (Government Printing Office, Washington, 1926), pp. 25-29.

³¹ U. S. Tariff Commission, *Print Rollers*, (Government Printing Office, Washington, 1926), p. 14.

³² U. S. Tariff Commission, *Barium Dioxide*, (Government Printing Office, Washington, 1924), p. 6.

³³ U. S. Tariff Commission, *Oxalic Acid*, (Government Printing Office, Washington, 1925), p. 4.

³⁴ U. S. Tariff Commission, *Taximeters*, *op. cit.*, pp. 4-5.

³⁵ U. S. Tariff Commission, *Print Rollers*, *op. cit.*, pp. 5-7.

³⁶ U. S. Tariff Commission, *Methanol*, *op. cit.*, p. 26.

in accounting methods by the company making most of the German meters. In the print roller investigation, German costs were adjusted to a later period than the one originally taken, because of German currency depreciation.

In all the other investigations, identical cost periods were taken for both foreign and domestic costs, with one other exception. In the flaxseed investigation, Commissioner Dennis pointed out that for Argentina, invoice prices for 1926 had been taken as evidence of crop costs in 1925, and those for 1927, for 1926. And the invoice prices of the 1926 imports, representing the 1925 crop costs, were fifty-six cents lower than if 1925 invoices had been taken as evidence of 1925 costs. He questioned the advisability of comparing domestic costs for a given year with invoice prices in New York of imports grown in the southern hemisphere the year before.³⁷ His objection, apparently, did not influence the President.

A somewhat similar point was raised in the sugar investigation. It was debated whether the succeeding or the preceding Cuban crop should be compared to the Louisiana and United States beet sugar crops of a given year, since they arrived at different times in the competitive markets of the United States.³⁸ The President did not act on the sugar report, so no precedent is derivable therefrom.

In summarizing the manner in which the commission dealt with the problem of selecting the period for which costs were to be studied, six observations can be made.

First, when the choice was between data for a single but most recent year, and data for an average of years, the one taken was the one which, it was felt, more nearly reflected normal conditions.

The second observation is in the form of an unanswered question. Would the commission have been discharging its proper function under the section had it taken a cost period partly or entirely prior to the passage of the 1922 act, and which would have been tantamount to reviewing the act of Congress setting the original duty?

³⁷ U. S. Tariff Commission, *Flaxseed, op. cit.*, p. 41.

³⁸ U. S. Tariff Commission, *Sugar, op. cit.*, pp. 117 and 143-146.

Third, when the choice was between data for a single but not the most recent year, and data for later years, the commission took the data it felt most representative of normal conditions.

Fourth, in several cases, the commission prepared its findings upon data for a given year, but when its report was ready for delivery to the President, these data were one or more years old. Thus, before sending the report, later data were secured, and from them the commission determined whether or not any subsequent change had taken place with respect to costs of production.

Fifth, with respect to the timeliness of the cost data presented to the President, and especially, when acted upon by him, it may be said that much of the criticism of the section's administration was on this point, namely, the length of time consumed before any action was taken upon a proposed rate change. That this was realized by the commission was obvious from remarks made by several of its members, from time to time. No one explanation can be cited in this connection. Some of the delay may be accounted for because of the newness of the device, some, because of the lengthy procedure set up by the commission, some, because of the provisions of the section, itself, some, because of the political factors involved. Further observations upon this can not be fairly made at this early point, but will be made in later chapters.

The final observation has to do with whether or not the commission should have selected identical cost periods for both countries. Generally, this was done, but where it was not done, plausible explanation was at hand. In the flaxseed case, where invoice prices were used instead of actual foreign costs, it seemed defensible for the commission to take invoice figures for one year's imports as representing costs for the year previous.

In this problem, one main conclusion is reached, that in selecting the period to be used, as was the case in selecting the principal competing country, the commission was administering section 315 with a regard for normal times and conditions rather than for abnormal ones, even though those were immediately existing.

(b) *Determination of the Average*—In the matter of choosing

an appropriate average to be used in cost comparisons, the decision hinged, for the most part, upon two methods: the use of a weighted average of domestic or foreign costs versus the use of bulk-line costs. Bulk-line costs may be explained as those where all abnormally high or freak production has been eliminated, leaving only normal production. The bulk-line cost is therefore not an average cost.³⁹

This problem was first met in the wheat investigation, where it was practically settled. Costs were taken for 881 American producers in 36 localities, and for 951 Canadian producers in 43 localities. The question, then, was whether all of these costs should be weighted and averaged arithmetically, or whether they should be arranged in a frequency table, and those at the bulk-line used for the purpose of equalization.

In the report of the commission, both figures were computed. The commission stated that many of the interested parties were in favor of bulk-line costs being taken for each country as they would cover the bulk of the annual product instead of only a portion thereof as would be the case if the arithmetic average were used.

Two arguments against the use of bulk-line costs were advanced by the commission. First, that there might be cases where two points on the cost curve would equally well represent bulk-line costs and that, in such cases, the selection of a single bulk-line cost would involve discretion on the part of the commission, which action might be questioned. Second, that it might happen, as had actually already been found in the wheat investigation, that bulk-line costs would cover more of one country's crop than the other. To compare bulk-line costs which represented 95 per cent of the Canadian crop with those representing 80 per cent of the domestic crop, was felt unfair and a discrimination, in that case, in favor of the competing country.⁴⁰

The commission was divided on the point, Commissioners Marvin, Burgess, and Glassie, favoring the use of bulk-line costs. They claimed the intent of the section was that American

³⁹ U. S. Tariff Commission, *Dictionary of Tariff Information*, *op. cit.*, pp. 191-192.

⁴⁰ U. S. Tariff Commission, *Wheat and Wheat Products*, *op. cit.*, pp. 6-7.

products should be placed on a parity with competing imports, and that this would not be accomplished if a parity were established between a fraction of the American product and imports with which the entire domestic crop would have to compete. If the weighted average were used, they felt that all those domestic producers having costs above that average would be left unprotected, while those below it would continue to face foreign competition from those foreign producers whose costs, in turn, were lower than the average. It was possible that imports in sufficient quantity to satisfy domestic demand might be produced at costs lower than the average, and thus domestic producers would be forced to a reduced profit, perhaps to no profit at all. They cited the weighted average already computed. It was \$1.34 and it thus represented 68 per cent of the American crop, and 67 per cent of the Canadian crop. But, 53,429,000 bushels were found produced at or below that cost in the United States while 271,236,000 bushels were found produced at or below that cost in Canada. Assuming the tariff to equalize such average costs, competition in the American market would still be 53,000,000 American bushels against 271,000,000 Canadian bushels. If bulk-line costs were used, the comparable figures would present a very different picture. The bulk-line cost of \$1.80, would cover the costs of 87.4 per cent of the domestic crop, and 90.8 per cent of the Canadian crop would be covered by their bulk-line cost of \$1.10 per bushel. The use of bulk-line costs would thus have had the duty equalize the costs of 68,900,000 bushels of the domestic crop, and 403,895,000 bushels of the Canadian crop. Even so, all domestic producers would not be protected, but it was felt that the few which would remain unprotected, would be but a remnant of the whole, and as well, unusually high cost producers. If average costs were used, 32 per cent of the domestic producers would be left unprotected.

In that particular investigation, they found that a weighted average assumed that the difference of costs at such average was practically the same as the difference between costs up and down the line, which they found was not the case. Cost differences between domestic and Canadian producers in the low cost brackets were very small, while those in the high cost brackets

were very great. This latter group they felt needed the protection, since the existing duty offered sufficient protection for the lower cost producers. Finally, they contended that it was marginal cost and not average cost which determined prices, and that price and not cost was the important element in competition. The use of bulk-line costs would protect the marginal producer at a fair price after eliminating, properly, the abnormally high cost producers.⁴¹

Commissioners Culbertson, Lewis, and Costigan replied that in spite of the academic arguments in favor of bulk-line costs, the impossibility of arranging the data, in all cases, in a frequency table so that one single bulk-line point would be obtainable, was a deciding objection to its use. Testimony given before the commission when it was holding hearings on the subject of bulk-line costs by Professor Willard of the North Dakota Agricultural College was cited. He said that the use of bulk-line costs would be tantamount to regulating production. If the bulk-line cost were set low, production would tend to increase; if it were set high, to decrease. Finally, they held it was not fair to eliminate any producers, even those with high costs, since they might become low cost producers the following year due to a return of favorable production conditions.

The President, apparently, accepted the use of the weighted average, for he proclaimed the duty change suggested by Commissioners Culbertson, Lewis, and Costigan.⁴²

In the sugar investigation, concurrently undertaken with the one on wheat, costs were computed on the basis of the weighted arithmetic average. In the commission's report, it was stated that the use of bulk-line costs had been urged upon the commission by representatives of the domestic industry but it was found that in order to use them, much more comprehensive data would have been needed than if the weighted average were used. It was doubted whether data for some years, for given areas, would be comprehensive enough for the determination of such a cost. Finally, the report cited the objection to bulk-line costs given

⁴¹ U. S. Tariff Commission, *Wheat, op. cit.*, pp. 29-32.

⁴² *Ibid.*, pp. 39-42 and 71.

in the wheat investigation; the possible inability of deriving one point on the cost curve to serve as a bulk-line cost, and in the absence of which, discretion would have had to have been exerted in the choice of some one of the two or more bulk-line costs.⁴³

Commissioners Culbertson, Lewis, and Costigan, again, favored average costs. They cited the action of the President in the wheat investigation in which he favored that average. Three other reasons for favoring such average were advanced by them. First, that Congress, itself, had not contemplated the use of bulk-line costs, since in debate on the section, it had constantly referred to "general costs" and "weighted averages". Also, that bulk-line costs were rarely used by other government agencies, except during the price-fixing activities of the war period. On the other hand, governmental agencies quite generally used weighted averages; the Tariff Commission, itself, having used them in determining differences in costs of production during the Taft administration. Also, that the weighted average was the basis used in the wheat, barium dioxide, and sodium nitrite proclamations made by the President. Second, that, upon analysis, the unsoundness of attempts to make tariff adjustments on the basis of bulk-line costs, was indicated. For such products as wheat, sugar, and wool, prices were set internationally, and thus, the bulk-line cost tended to be the market price, and the result would be that differences in bulk-line costs would either give no stimulus whatever to the industries, or would merely confirm the existing tariff rates. They felt section 315 was adopted by Congress to give rates flexibility, and not to determine costs of production which would tend to maintain the *status quo* of those rates. Third, they pointed out that even though economists and statisticians agree upon the definition of bulk-line costs, they rarely agree in their designation on the cumulative cost curve. They felt it would be little short of impossible to obtain an indisputable figure. This tended to the conclusion that the bulk-line was a vicinity rather than a point, and that within that vicinity, several different duties might be warranted, depending on the particular point selected. They

⁴³ U. S. Tariff Commission, *Sugar, op. cit.*, p. 44.

concluded that "a scientific application of the flexible tariff provision is impossible if it depends upon the selection of points so elusive and divergent as 'bulk-line costs'".⁴⁴

No change was made in the sugar rate by the President, therefore no concrete precedent is derivable therefrom.

In the oxalic acid investigation, German costs were refused the agents of the commission, and invoice prices were taken as inferentially the costs of production in the absence of dumping. Those prices were held to be at least equal to, if not greater than, the costs of the German marginal producers. In the United States, the two domestic producers were found to have rather widely different costs. The question arose that if German invoice prices were assumed to be at least equal to the costs of the marginal producers, should not the higher domestic costs be taken to similarly indicate the costs of the domestic marginal producer? The issue was sidestepped when it was found that the maximum duty increase was warranted, whichever domestic costs were taken.⁴⁵

In no later case was the question of the average to be used seriously debated, it being the practice to use the weighted average for both domestic and foreign costs whenever two or more producers' costs were used. In those cases, where invoice prices were used to represent foreign costs, they were weighted and averaged.

The conclusion, therefore, is that costs were regularly weighted on the basis of a given producer's production as compared with the total product, and a simple arithmetic average struck. The use of bulk-line costs was discarded as the alternative, and apparently, such was done because of the difficulty of determining it in all cases. In the absence of a single occurring point, discretion would have had to have been exercised by either the commission or the President or both in determining the cost point, a practice deemed extra-legal by the parties concerned.

(c) *Domestic Costs*—Throughout the entire study of both foreign and domestic cost gathering, definite observations and

⁴⁴ U. S. Tariff Commission, *Sugar*, *op. cit.*, pp. 80-81.

⁴⁵ U. S. Tariff Commission, *Oxalic Acid*, *op. cit.*, pp. 4-5.

conclusions are often rendered difficult or even impossible by virtue of the fact that the disclosure of confidential information was forbidden by section 708 of the Revenue Act of 1916. In several investigations, either domestic or foreign costs were submitted by only one producer, therefore no actual figures could be given. The practice was, in such cases, to express the costs of one country as 100 per cent, and the costs of the other country as percentages of 100 per cent. In other cases, the actual costs were submitted in confidential form to the President, but presented in averages in the commission's published reports.

Since it was the main duty of the commission to compute costs of production, and since, within the commission, the Accounting Division was the agency delegated to do this task, a study of their general procedure is illuminating.

Its duty was to obtain and analyze cost data for the purpose of investigations under section 315. The two general classes of commodities investigated were manufactured goods and agricultural commodities, the costs for which were collected in the field and then organized in the Washington office of the commission. While the Accounting Division admitted that most of the difficulties in cost collection were experienced in the field, more time was usually taken in the office work of compiling and analyzing the collected data.

The first step taken by that division was the preparation of a cost schedule for the recording of detailed information and for the subsequent determination of costs. Each schedule was individual to a given investigation, no standardized form being appropriate for all the varied investigations undertaken. In some investigations, a trial schedule was made up and used for cost recording in a few establishments in order to determine its practicability. Two distinct services were found derivable from a use of such a cost schedule: first, the same costs were taken for each producer as provided in the schedule, and second, a check was had against the omission of essential elements for any concern.

The greatest difficulty experienced, arose from the necessity of obtaining specific costs for specific products. It was found that most producers kept cost records for their entire output, but not

for particular articles or specified grades in those cases where more than one grade of one or more products was made. The division reported that in no investigation under the section were all the cost and production data for specific grades of the articles produced, found adequate for the special needs of the commission. It was found that books of different establishments varied widely with respect to fulness, accuracy, and usability, and that, because of the difference in manufacturing methods, basic accounting methods were widely divergent. Some producers made their own intermediate goods, for example, while others bought them in the market. Certain producers used a given raw material in the production of a given product, while other manufacturers used another raw material to make the same finished product. In other cases, both used the same raw material but used entirely different methods of processing. The complicating factor of joint products and by-products often arose to annoy them.

Two main cost items were given as the important elements in the final cost figure, direct and indirect costs. The first group was relatively easily gotten in most cases, for example, wages. But overhead, an indirect item, gave considerable difficulty and a separate handling of that item was necessary in most of the investigations. Likewise the quantity of production had to be very carefully considered since the commission could use only unit costs and the derivation of these could only be gotten by dividing the aggregate costs of production by the quantity produced. In the event that costs were not taken for a whole factory, samples were selected to insure comparability for both domestic and foreign cost purposes, and the costs of these samples, representative as they must be, were taken.

The first step in the actual cost collection was to reconcile the leading expenses recorded in the books of the company for labor, raw materials, shop supplies, superintendence, depreciation, and so forth, with the profit and loss account. Each of these was charged to one or more departments, some directly while others were allocated on appropriate bases. Then the costs of the service departments were distributed to the production departments, for example, the power plant expenses were charged

to each department on the basis of its consumption of horsepower hours. The costs of each production department were then applied to specific articles by means of cost rates for the operations performed.

The determination of imputed interest was mentioned as one of the most difficult of all the cost problems, since any extensive use of machinery had to be considered a competitive element apart from the other cost items mentioned above. That item was derived by finding the value of all the assets of the plant, and to that base, the common rate of interest in the industry was applied. The determination of that valuation figure involved extended work. In some cases, original costs had to be gathered with subsequent additions or deductions over a period of years.

Transportation costs were also mentioned, but since this subject will be considered in the following chapter, it is only referred to here as one of the duties of the Accounting Division.

After the costs were gathered, they were carefully examined and tabulated in the Washington office. Where peculiar cost conditions appeared as a result of the field work, disposition of them was made after consultation. The final tabulations of unit costs, when presented to the commission, were accompanied by a detailed accounting report showing how the field work was carried out, the allocations and other processes by which the work was accomplished, and exactly what was included in each of the items appearing in the final tabulation.⁴⁶

In addition to the determination of what items were to be included in the cost figures, and the difficulties experienced in determining those costs, certain additional difficulties, often peculiar to a single investigation, were met in both domestic and foreign cost collections. Those met in domestic cost-taking will now be considered.

The most important difficulty experienced in this connection was just what domestic producers should be selected for cost investigation. This did not always present a problem, for in some cases there were only one or two domestic producers. But if a larger number were found, it became a problem to decide

⁴⁶ *Thirteenth Annual Report of the U. S. Tariff Commission, 1929*, pp. 37-42.

which ones should have their costs taken. The problem reached its apex in the agricultural investigations, where it was deemed unnecessary to collect costs for the entire product. An initial step in this respect was to eliminate all those producers whose product was not comparable with the imported product, a point to be taken up in the next chapter.

In the first investigation, on wheat and wheat products, the so-called survey method of cost collection was used; 881 records were obtained in thirty-six localities which it was thought would give a representative cost of production figure for the domestic crop.

In the sodium nitrite investigation, it was found that there were three domestic producers. Costs were taken for only two of them as the third was so small that its costs were deemed unrepresentative.

The costs of the two American producers were taken in the barium dioxide and diethylbarbituric acid investigations, and checked back to the original books by the commission's agents. In the oxalic acid investigation, costs were taken for the only two domestic producers, the third one having gone out of business prior to the completion of the investigation.

The potassium chlorate investigation presented an unusual situation. There were three American producers in operation at one time or another during the period for which costs were taken. These three may be referred to as Companies A (North American Chemical Company), B (The National Electrolytic Company), and C (The Ohio Salt Company). Company A ceased operation in May, 1922, did not operate during 1923, resumed production in 1924, and was the only producer in that year. Company B operated under capacity during 1922, closed its plant in December, 1922, did not operate in 1923, and dismantled its plant in 1924. Company C produced intermittently in 1922, and was the only plant producing in 1923, but it closed down in 1924 and dismantled its plant. The question was how to compute domestic costs under such circumstances. The method finally used was to take costs for plants A and B for the first half of 1922, and costs for plant C for all of 1922. Company C's costs were taken for the first six months of 1923, and to these

were added the estimated costs of plants A and B (even though not operating), which costs were based on their actual 1922 costs for the same period, and adjusted to 1923 costs of the same items as wages, and so forth, all of those costs being based on an operation at two-thirds capacity.⁴⁷

In the live bobwhite quail investigation, costs of production were not used for the comparison. Instead, trapping costs were taken, since artificial methods of propagation were not considered on a profitable commercial basis in the United States (in Virginia), and the natural propagation practiced in Texas had been stopped because of the withdrawal of the necessary game permits by the State Game Department.⁴⁸

The taximeter investigation presented another phase of the problem of which companies should have their costs taken. Cost data were taken for two domestic producers: the Pittsburgh Manufacturing Company, and the American Taximeter Company, referred to as "Atco". To the inclusion of Atco costs, Commissioner Costigan objected. That company, as such, had gone out of business after the cost data had been collected. It had sold out to the Ohmer Fare Register Company of Dayton, Ohio. Thus, Mr. Costigan held that their costs as an independent company could not be inferred to be those of a later date when that company was part of another company.⁴⁹

Commissioners Marvin, Baldwin, and Brossard replied, that it would not be fair to exclude Atco costs simply because they felt them unrepresentative of the costs of the purchasing company. It was an important producer when the costs were being taken and had continued to be so, except it had been merged, in the meantime, with another company. To exclude its costs would have meant the exclusion of 33.7 per cent of the domestic meters which competed with the foreign products. They concluded that "a mere change in ownership is no evidence of appreciable change in costs of production."⁵⁰ The President proclaimed the duty suggested by these commissioners.

⁴⁷ U. S. Tariff Commission, *Potassium Chlorate*, *op. cit.*, p. 5.

⁴⁸ U. S. Tariff Commission, *Live Bobwhite Quail*, (Government Printing Office, Washington, 1925), p. 5.

⁴⁹ U. S. Tariff Commission, *Taximeters*, *op. cit.*, p. 9.

⁵⁰ *Ibid.*, p. 17.

In the men's sewed straw hat investigation, such a great variety of types and conditions of production was found that the commission decided to limit the investigation to split sennits, improved sennits, and flatfoot sennits, since domestic and foreign competition centered around these types, chiefly.⁵¹

One of the numerous points of disagreement in the butter investigation had to do with the collection of domestic costs. It was held that the cost of butterfat in each area studied was an essential cost element. Since such costs could not, practically, be secured for all farms and creameries, representative ones were selected. The areas selected were the large producing centers, and these were subdivided into groups representing the different types of farm and herd management. Typical producers in each were selected for cost study, thereby eliminating unusually large and small producers, farms producing beef or pure bred dairy stock, chiefly, and dairies producing milk for dairy purposes. For each area, costs were collected from not less than twenty-five farms and two creameries. The average cost found was weighted by the number of pounds of butterfat sold in that area, as shown by the 1919 census.

So few farmers kept any cost records or records which were usable by the commission, that the survey method of cost collection was adopted. It was felt this was justified since the method was quite generally used by the Department of Agriculture, and by the college and university experiment stations.

Costs were collected for cooperative and independent producers, with costs of centralizer-produced butter being omitted, because it was held not comparable to the imported butter. Commissioner Dennis objected to the inclusion of the costs of domestic independents. He wanted the comparison based on costs for Danish cooperatives and domestic cooperatives, and not domestic cooperatives and independents, which latter group he held to be high cost producers. Furthermore, he objected to the valuation of the time given to the production of butter on the part of farmers, housewives, and children of the family, which work he felt was intermittent and self-administered, and

⁵¹ U. S. Tariff Commission, *Men's Sewed Straw Hats*, (Government Printing Office, Washington, 1926), p. 2.

incapable of accurate evaluation. He felt the accountants had imputed value to time not actually spent in dairy work by the farmer and his family, just as they had imputed value to straw and other roughages which had little or no market value in themselves. All in all, he felt the farm costs disproportionately high.⁵²

Commissioner Costigan objected to the use of the survey method. In explanation of this method, it might be said that instead of taking the costs of all producers, unnecessary in some cases, physically impossible in others, representative producers were carefully selected and their costs taken. There were three possible alternatives to the use of the survey method. First, costs might have been taken directly from the farmer's books of account, but it could be safely assumed that only a very small percentage of the farmers would be keeping accurate and complete cost records. Second, the commission's agents might have arranged previously with the producers, to keep detailed costs under the supervision of the commission. The disadvantage of this method was that at least a full accounting year would have had to elapse before any data would have been available. Third, the questionnaire method might have been used, in which a questionnaire would have been sent to each selected producer to be filled out, unaided, and returned to the commission. That method was deemed to be in its experimental stage, and would have yielded only rough approximations. All three of these were discarded by the commission in favor of the survey method, wherein trained agriculturists of the commission's staff, usually trained accountants as well, visited farmers and producers, and obtained from them their costs, which were placed upon previously prepared cost schedules.⁵³

But Commissioner Costigan held that only approximate costs had been sought by the majority of the commission through the use of farm-management surveys, and that these had been accepted without reasonable deductions. He cited the fact that the cost figures so derived were higher than the price of butter even during periods which agricultural experts considered fairly

⁵² U. S. Tariff Commission, *Butter*, *op. cit.*, pp. 62-63.

⁵³ *Ibid.*, pp. 20-21.

prosperous for the butter industry. Furthermore, he attacked the failure of the accountants to gather costs of production of feeds, and the exact credits to be charged for the use of farms as homes. He urged that the feeds be entered at their costs of production rather than their market prices, since it was the duty of the commission to disclose relative cost conditions rather than to be concerned with market prices. The fact that ninety-two per cent of the labor cost item had been estimated, and only the remainder actually computed, was scored by him.⁵⁴

Commissioners Marvin, Brossard, Glassie, and Baldwin held that the survey method was the only practicable one to use in agricultural investigations, and that, by such method, costs were collected by members of the commission's own staff, and that it was under "the practical necessity of accepting the data collected by their trained agents."⁵⁵

In the butter investigation, apparently, the adequacy of the survey method of gathering agricultural costs was questioned and decided upon. The President accepted the method, and in all the subsequent agricultural investigations, that method was used, without further discussion on the part of the commission.

A difficulty peculiar to it, arose in the paint brush handles' investigation. It was found that Canadian costs could be gotten for each of the 137 varieties of handles produced, as well as the quantity of each variety manufactured. For the United States, costs could be secured, but the quantity data were unobtainable. The solution devised by the commission was to weight domestic production costs by Canadian production figures for the several varieties. This assumed that the several varieties made in Canada were produced in exactly the same quantity in the United States. In view of the basic and irremediable infirmity of the domestic data, the President accepted that procedure.⁵⁶

In the pig-iron investigation, costs were collected only for foundry and malleable iron, since those two types were found to compose seventy per cent of all the pig-iron made in the United

⁵⁴ U. S. Tariff Commission, *Butter*, *op. cit.*, pp. 80-85.

⁵⁵ *Ibid.*, pp. 67-68.

⁵⁶ U. S. Tariff Commission, *Paint Brush Handles*, *op. cit.*, pp. 5-6.

States, and an even greater percentage of all the imported pig-iron.⁵⁷

Costs in the cheese investigation were collected on three different bases. First, the farm basis, where the costs were distributed as determined for the farm as a whole, to the various farm products on the sales allocation principle, that is, the total farm cost was allocated to milk and to the other products according to the proportion of total income obtained from each product. Second, the dairy enterprise method, which charged directly to the herd, the costs of feed, pasture, labor, overhead, and so forth. From this was deducted the sale of by-products incidental to milk production, in order to get the net cost of milk production. Such costs were not affected by profits or losses on the part of the other farm products such as would be the case in the first method. Third, the-amount-returned-to-the-farmer basis, was the one in which the cost of the milk was determined from the actual amount received by the farmer for his milk from the cooperative factories.⁵⁸

Costs for Switzerland could not be obtained under the second method, therefore, only the first and third methods were available for consideration. Commissioner Costigan pointed out the desirability of following the commission's former practice of using the second method, but not being able to do that in the cheese investigation, he attacked the costs found under the other two methods. A cost difference of 13.15 cents per pound was found by the first method, and of 6.04 cents, by the third method. He submitted a table showing the relative prices of farm products for the years 1922-1925, and for the crop year 1923-1924, the period covered in the investigation. He pointed out that the prices of Swiss cheese and milk were relatively higher in the period for which costs were taken than were the prices of other farm products, so that if the first method were used, an undue part of the costs of the farm would be charged to milk because of its higher price. To use such a method, would be tantamount to finding the need for a higher duty on the more profitable products,

⁵⁷ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, p. 11.

⁵⁸ U. S. Tariff Commission, *Swiss Cheese*, (Government Printing Office, Washington, 1927), pp. 19-20.

and a lower one, on the less profitable products.⁵⁹ The commissioner, therefore, virtually, refused to accept either of the commission's cost computations.

Finally, it was found, in the cheese investigation, that a generally higher price prevailed for the Swiss product in the American market than for the domestic product. This will be discussed more fully below, but it has a bearing on the attempt to determine which of the three cost figures was used as the basis for the President's duty change. It is sufficient, in this connection, to note that for a period of years before this investigation, Swiss cheese prices had averaged several cents a pound higher than domestic prices. This was held to indicate the superiority of the Swiss over the American product, and thus deserved consideration under subdivision (c) of the section.⁶⁰ Thus, if the first method of cost comparison were to be used, the maximum duty increase would have been warranted. If the third method were to be used, the maximum increase would not have been warranted unless adjustment were made for the price advantage of the imported product. The President increased the duty by the maximum amount, but it is impossible to determine whether he accepted the first cost figure or the third one, adjusted as above explained.

In the cherry investigation, no farm cost study was made. Cost data for the different grades of fresh cherries were submitted with the application looking for a duty change, and these were checked by the commission, and then used by it. Sulphuring and brining costs, however, were obtained from the books of a number of producers. Thirty-three cost records from the California, Washington, and Oregon producing areas were obtained in addition to those submitted with the application. In collecting these, the farm schedules were filled out for the different producers in a group meeting instead of individually by the commission's agents. The data were prepared on two bases: (1) the price paid for the fresh fruit, and (2) the orchard cost of production of the fresh fruit.⁶¹ Commissioners Dennis, Costigan,

⁵⁹ U. S. Tariff Commission, *Swiss Cheese*, *op. cit.*, pp. 34-39.

⁶⁰ *Ibid.*, pp. 29-30.

⁶¹ U. S. Tariff Commission, *Cherries*, (Government Printing Office, Washington, 1928), pp. 13-14.

and Dixon held the domestic cost data unrepresentative, since only thirty-three records had been obtained, whereas in the twelve other agricultural cost studies, made by the commission, the number of records had averaged over five hundred.⁶²

Commissioners Marvin, Brossard, and Lowell replied that it was the object of the commission to gather representative costs, and while the securing of more records would have been desirable, any belief that a larger number would have changed the results was purely an assumption. They pointed out that the commission's cost data covered 3.14 per cent of the estimated domestic crop, while the 691 farm cost records in the butter investigation covered only .59 per cent of the domestic product, and the 881 records in the wheat investigation, 1.11 per cent of the total crop.⁶³

In the rag rug investigation, the collection of costs was limited to rugs of the "hit-and-miss" variety, for these were held to be representative of domestic production.⁶⁴

A unique problem arose in the cast polished plate glass investigation. Costs were secured for glass, irrespective of size. When it came time to suggest the necessary duty change, it was found that in the 1922 act, the duty was in three parts, and varied according to the different sizes of glass. Since the determined difference in costs for all plate glass, regardless of size, was found to be 20.31 cents per square foot, obviously it was impossible to increase the duty on such glass not exceeding 384 square inches from $12\frac{1}{2}$ cents per square foot to $18\frac{3}{4}$ cents, the maximum increase; the duty on glass above 384 square inches and not exceeding 720 square inches from 15 to 20.31 cents per square foot, within the fifty per cent limit; and that on glass above 720 square inches from $17\frac{1}{2}$ to 20.31 cents, also, within the limit. Such action would have destroyed the relationship of the rates fixed by Congress, and would have disregarded, in part, the factor of value, upon which the progressive rates were based. Accordingly, each rate was increased by the

⁶² U. S. Tariff Commission, *Cherries*, *op. cit.*, pp. 28-29.

⁶³ *Ibid.*, pp. 31-32.

⁶⁴ U. S. Tariff Commission, *Rag Rugs*, (Government Printing Office, Washington, 1928), p. 24.

percentage that the ascertained difference in costs exceeded the weighted average duty collected during the period of the investigation. That percentage was found to be 26.2.⁶⁵

In the egg investigation, farm costs could not be obtained for the area from which most of the eggs used for domestic breaking stock came. Farm flocks there were found to be a secondary enterprise and few farmers kept any cost records. The commission, therefore, took the prices paid for shell eggs as the cost of the raw material.⁶⁶ That investigation was limited, by the commission, to frozen eggs, as had dried eggs been included, domestic costs would have had to have been those of a single factory located in Kansas City. Those costs were felt to be incomplete and inadequate in view of the fact that the factory was in its first year of production.⁶⁷

Commissioner Dennis objected to the area selected for the taking of costs in the milk investigation. He wanted costs to be taken only for farms which sent milk to New York, and which, in order to do that, had to be approved by the Board of Health of that city. His objection was not sustained.⁶⁸

In the cream investigation, Mr. Dixon objected to the fact that domestic costs were taken for areas given over to the production of higher cost milk to be consumed as fluid milk, whereas Canadian costs were taken for areas given over to the production of lower cost milk to be used in milk and cream products. Furthermore, he held that notice should have been taken of the fact that Canadian cream imports were the product of summer dairying wherein the herd was largely pasture fed, while much of the domestic product was accomplished in the winter by the use of expensive feeding concentrates. He pointed out that if the Canadian summer costs had been compared with the summer costs of the Northeastern states or with all year round costs of the similarly organized industry in the North Central states, no increase in duty would have been warranted.⁶⁹

⁶⁵ U. S. Tariff Commission, *Cast Polished Plate Glass*, *op. cit.*, p. 33.

⁶⁶ U. S. Tariff Commission, *Eggs and Egg Products*, *op. cit.*, pp. 2 and 16.

⁶⁷ *Ibid.*

⁶⁸ U. S. Tariff Commission, *Milk and Cream*, (Government Printing Office, Washington, 1929), pp. 29-31.

⁶⁹ *Ibid.*, p. 41.

His objections apparently had no effect upon the President, since he proclaimed the duty increase suggested by the other five members of the commission.

In the casein investigation, the commission was unable to determine satisfactory costs either for domestic or foreign skimmed milk, an essential raw material. They so reported to the President, who took no action on their findings.⁷⁰

The above, therefore, constitute the additional cost problems presented to the commission in its investigations of domestic production over and above those connected with the difficulties experienced with diverse and often insufficient cost records. However, one important precedent was set up, namely, the acceptance of the survey method for the collection of agricultural costs. When manufactured products were examined, it was usually possible to take costs for a large percentage of the domestic product, but such complete cost gathering was neither practical nor possible for all agricultural products. The adoption of that method indicated the prevailing desire of the commission and the President to secure representative costs for comparative purposes under the section. It was not felt necessary to take costs for all agricultural producers if those whose costs were taken were certain to be representative of the producers as a whole. Acceptance of the method by other governmental agencies and private ones, as well, lent support to the fact that it was reliable and suitable for the needs at hand. In addition, if any producer felt that his costs should be included, if they had not been, he had the right to appear at the public hearing held, in each case, after the costs and other data had been collected, and before the preparation of the commission's report to the President, and request the inclusion of his costs in the commission's final report. Furthermore, the best known accounting methods were used in order to determine costs, and to analyze and prepare the final cost schedules for consideration by the commission and action by the President.

More will be said on this point, as well as upon other points, in a later, critical chapter.

⁷⁰U. S. Tariff Commission, *Casein*, (Government Printing Office, Washington, 1926), p. 28.

(d) *Foreign Costs of Production*—A goodly portion of the difficulties experienced in the gathering of domestic costs was experienced in connection with the gathering of foreign costs. The same lack of confidential information is present; the same difficulty was experienced with respect to gathering costs when cost records were either non-existent or complicatedly arranged. To this was added the difficulty, in many of the investigations, of a different language. In this connection, it might be interesting to note the foreign countries in which costs were studied, pursuant to section 315 investigations. Fourteen investigations were made in Germany, ten in Canada, five in Great Britain, four in Italy, three each in Argentina and Belgium, two each in Switzerland, Denmark, India, and China, and one each in Norway, Mexico, Greece, Japan, Spain, The Netherlands, Cuba, and Sweden. A different classification shows that thirty-five investigations were made in Europe, twelve in North America, five in Asia, and three in South America. The importance of Germany is notable, and the absence of investigations in France and Russia, equally so.

In connection with the collection of foreign costs, a wholly different problem of primary importance arose. In no case were domestic costs refused the agents of the commission, but in several, foreign costs were refused. However, such refusals were not nearly so numerous as was supposed. The following table shows the results of the commission's activities in this connection.⁷¹

Foreign cost data obtained:

Foreign cost data obtained and verified.....	46
Statements of foreign costs obtained but not verified.....	2
Costs calculated from collateral information, including prices, wages, etc.....	1

Total number of investigations in which cost data have been obtained. 49

⁷¹ *Thirteenth Annual Report of the U. S. Tariff Commission, 1929*, p. 18.

Invoice prices used:

Invoice prices used either because of objections raised by foreign governments or because of refusal by foreign producers.....	9
No attempt made to secure foreign cost data either because other information available to the Commission made it unnecessary, or because the Commission had reason to believe that foreign cost data could not be obtained.....	12
Total number of investigations in which invoice prices have been used.	21
Investigations which have been suspended or have not reached the stage where foreign cost data have been attempted.....	12
Total investigations ordered by the Commission for purposes of section 315.....	82

The new and main problem in foreign cost collections had to do with the question of using invoice prices in the event foreign cost data were refused the commission's agents. This first happened in the oxalic acid investigation. Invoice prices were taken, not to represent costs of production in Germany, but to be at least equal to, if not greater than, the costs of German marginal producers. Such prices were assumed to contain an element of profit, the exact amount of which was unknown, but since the difference between domestic costs and German invoice prices was more than enough to warrant a maximum increase in the duty, it was unnecessary to try to figure German costs more exactly.⁷²

The potassium chlorate and methanol investigations paralleled the one on oxalic acid in that respect.⁷³

In the pig-iron investigation, the same procedure was followed, except that foreign costs were not even sought. The commission took, directly, the invoice prices of Indian pig-iron as evidence of the costs of production in the determined absence of dumping. In its report, the commission apparently deemed it advisable to include a rather lengthy statement of its reasons for so doing. It began by saying that no assumption had been

⁷² U. S. Tariff Commission, *Oxalic Acid*, *op. cit.*, pp. 4-5.

⁷³ U. S. Tariff Commission, *Potassium Chlorate*, *op. cit.*, p. 6 and *Methanol*, *op. cit.*, p. 25.

made that, under section 315, prices, as such, should be compared with costs, or that, in that particular case, foreign prices and foreign costs were identical. The section definitely stated that differences in costs of production were to be equalized by a change in duty. For that purpose, costs of any individual producer were not those to be used, rather were costs for all domestic producers to be compared with those of all foreign producers in the chief competing country.

But the statute was not found to lay down any definite method for the determination of costs. All that it said was that the ultimate thing to be compared should be costs of production. It was held, as in most factual inquiries, that the matter of determining what evidence would be valid and adequate for the purpose of ascertaining the necessary facts, was left for the application of the usual processes of proof. They continued that "while the statutory standard remains the same throughout, the evidentiary matter may be of many varieties."

Thus, for the purposes of the section, the facts concerning prices could be logically used as a basis for working toward the stated standard of cost differences. The whole question, the commission felt, was one of satisfactory proof. They went on to point out that there was no evidence that pig-iron had been sold in the United States at a price lower than its cost of production. Thus, such price could logically be assumed to contain an element of profit, but still, it was evidence, at least, of the cost of production of the marginal producers. Furthermore, the commission had found that the spread between the average foreign invoice price and the average domestic cost was greater than could be equalized by a maximum increase in the duty, whether that domestic cost was a marginal cost or a weighted average of all domestic costs. The commission hastened to say that "this report must not be taken as expressing any view on the question as to the methods by which price figures should be dealt with in order to ascertain production costs therefrom under other and different circumstances."⁷⁴

Commissioner Costigan objected to the procedure, and

⁷⁴ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, pp. 23-26.

held that the commission in departing from its established practice of securing first-hand, itemized costs, and in resorting to inference and secondary evidence for the foreign cost figure, must have either desired to test the legality of the method used, or to practice economy. He went on to cite the investigations in which the commission had carefully collected all foreign and domestic costs, and in which it had repeatedly referred to the primary importance of that task. Also, there were those investigations in which invoice prices had to be used in place of foreign costs because of the inability to get the latter. In the case of pig-iron, the commission had, at the outset, decided not to collect foreign costs at all, but to use invoice prices instead. He then recited the following points which he held were important considerations in the event such secondary information was to be substituted for primary information: (1) Section 315, as a whole, contemplated a more complete compilation of statistically ascertainable foreign cost data than any inference from foreign prices could afford, (2) invoice prices would not, in every case, show normal foreign production costs, (3) invoice prices became even less indicative of foreign costs if foreign producers had more or less confidential relations with importers, (4) the elimination of the conceded element of profit in invoice prices would become a problem of great importance if they were to be taken for foreign cost purposes, (5) the use of invoice prices might conceivably exclude important competitive and similar imports which, during the time of the investigation, might not have been imported or might not have been imported in normal amounts, (6) the prevailing practice of charging more for exports to one country than to another, would render the *prima facie* acceptance of invoice prices as cost evidences more dangerous than ever, and (7) the possibility of manipulation of invoice prices by exporters.⁷⁵

That the President accepted what Commissioner Costigan had declared to be a "novel ascertainment of foreign costs by inference, without foreign field work" was apparent as he proclaimed the duty change recommended by the other members of the commission.

⁷⁵ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, pp. 29-36.

The cherry investigation presented a slightly different case. An agent of the commission was sent to Italy to gather costs, but found that cherry growing was not a specialized branch of agriculture, and that only a small portion of the crop was grown in cherry orchards, the major part being grown along with other fruit trees, and in the borders of fields. Most of the labor was performed by the farmers and their families in connection with other agricultural operations. Thus, the commission decided to use the prices paid by Italian factories for cherries as evidence of costs of production.⁷⁶

In the following investigation on rag rugs, the question of whether or not invoice prices should be used as evidence of costs was settled. The commission did not collect Japanese costs, but used invoice prices for its purposes. The maximum duty increase was warranted even so. The commission's report was sent to the President on June 11, 1927, but he did not take final action upon it until February 12, 1928. At least a part of the delay can be accounted for by his apparent indecision concerning the use of invoice prices. On September 2, he wrote to the Attorney General for his opinion on the matter. On October 19, Mr. Sargent replied. The question as stated was whether under section 315 (c), requiring an investigation into foreign and domestic costs of production by the Tariff Commission previous to any presidential proclamation making a duty change, that requirement was satisfied if foreign costs were obtained by inference from invoice prices with no attempt having been made by the commission to secure foreign costs from the accounting records of foreign producing companies or from a field investigation abroad. It was pointed out that foreign costs were obtainable, but that the commission had decided, nevertheless, to use invoice prices.

He then quoted the appropriate parts of the section, and concluded that a commission report which failed to investigate foreign costs as directed by the section but instead had inferred such costs from invoice prices, failed to satisfy the statute unless a detailed investigation was deemed impracticable. He defined

⁷⁶ U. S. Tariff Commission, *Cherries*, *op. cit.*, p. 14.

the word practicable as possible, feasible, or usable. In that connection he said: "I am of the opinion that under the provisions of this statute the President may refrain from taking into consideration wages, costs of materials, and other items of production in competing countries usually ascertainable by direct inquiry or field work where he finds that such an inquiry is impracticable in the sense of being futile." He was of the opinion that a direct investigation abroad, in that case, could be considered futile, since in taking invoice prices, which were assumed to be not less than the cost of production, and determining the difference between them and domestic costs, the determined difference could still not be equalized by the President even if he made the maximum increase in duty permissible under the section. He felt, therefore, that an investigation into actual costs of production in Japan was futile unless it should disclose that such costs were higher than the invoice prices. He saw nothing in the report to indicate that Japanese manufacturers were selling those rugs in the United States at less than cost.⁷⁷

The President then proclaimed a duty change based upon the report of the majority of the commission which had used invoice prices as evidence of foreign costs of production.

In the fluorspar investigation, costs were refused by English producers and invoice prices were used, and again, the maximum duty increase was warranted.⁷⁸ In the onion investigation, official representations were made to the commission in regard to the inadvisability of attempting to collect Spanish costs, since the growing was done so largely by small farmers and their families. That fact in addition to the language difference led the commission to use invoice prices, since the maximum duty increase was warranted even with their use.⁷⁹

In the flaxseed investigation, the commission reported that it "did not find it practicable to obtain data from producers in Argentina with respect to the cost of growing flaxseed in that country. Data on invoice prices were compiled from consular

⁷⁷ *Eleventh Annual Report of the U. S. Tariff Commission, 1927*, pp. 116-120.

⁷⁸ U. S. Tariff Commission, *Fluorspar*, *op. cit.*, pp. 41 and 48.

⁷⁹ U. S. Tariff Commission, *Onions*, *op. cit.*, p. 50.

invoices—and from market prices—at Buenos Aires. In addition, the commission gathered from published reports of the Argentine Minister of Agriculture information as to the yield per acre, wages paid, value of land—and cost per bushel of flaxseed.”⁸⁰

Thus an additional interpretation of section 315 resulted from the handling of foreign costs. According to the opinion of the Attorney General, the terms of the section did not require a foreign field investigation, unless by so doing, data would have been acquired which would have been useful. That opinion effected a material saving in those investigations where the maximum duty increase was warranted even if invoice prices were used.

(e) *Other Cost Problems*—In practice, it became a relatively easy matter for the commission to determine what basic cost elements should be included in their final figures, but under subdivisions (3) and (4) of part (c) of the section, certain fine points arose as to what cost differences should be included and what ones, excluded. Two of the most important of those will be considered below, namely, the advantages and disadvantages arising out of currency or exchange fluctuations, and the entire problem of transportation costs. The other cost problems fall into several groups as indicated forthwith.

(1) Determination of a Fair Land Charge and the Interest Problem

Three different methods of handling the land charge-interest problem were considered in the first investigation, the one on wheat. The cash rental basis wherein the rental the landlord received, less taxes, or the rental the farmer-owner would have been willing to have taken, less taxes, was suggested for use. The current rates of interest on land values as estimated by the farmers, and the current rates of interest on average land values as appraised for loan purposes by the United States Federal Farm Loan Board were the other two bases proposed.

Four reasons were advanced by the commission against the

⁸⁰ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 26.

use of the second method, and in favor of the first. First, the sentimental value attached by some farmers to their land might result in their giving it a higher value than the capitalization of the net income at current rates of interest would have warranted, second, the tendency, on the part of some farmers, to capitalize expected future income instead of present income, third, the infrequency of land sales in both the Northwestern states and in the Canadian Prairie Provinces created a lack of reliable figures for actual transfer values, and fourth, the prevalence of tenancy in the spring wheat areas. In spite of the prevalence of tenancy, it was found that most farm owners were able to give an estimate of a fair cash rental, thus, it was decided that the average of actual and estimated cash rentals for a locality, after deduction of taxes, would be a nearer approximation of a fair land charge for the use of land than an interest charge on stated values.⁸¹

In the next investigation, Commissioners Marvin, Burgess, and Glassie urged that interest paid and rentals should be excluded from cost comparisons, and in their place should be a charge on the return to the capital employed in the business. They held that merely because one firm paid interest on borrowed capital should be no reason why that cost should be included, whereas another producer using his own capital and thus not technically paying interest should not be allowed to count such charge in his cost figure. Such practice would prove very damaging to American producers who characteristically had larger investments in labor saving machinery than were found abroad.⁸²

In the potassium chlorate investigation, specific mention was made that no charge for interest paid on capital invested in the domestic business was included. No reasons were given, but a possible explanation might be found in the fact that even so, the maximum duty increase was warranted.⁸³

The butter investigation seems to point to the adoption of the practice suggested by Commissioners Marvin, Burgess, and Glassie. The interest charge in the United States was

⁸¹ U. S. Tariff Commission, *Wheat and Wheat Products*, *op. cit.*, pp. 7 and 10.

⁸² U. S. Tariff Commission, *Sodium Nitrite*, *op. cit.*, pp. 18-20.

⁸³ U. S. Tariff Commission, *Potassium Chlorate*, *op. cit.*, p. 6.

figured by allowing six per cent upon: (1) the average values of the two inventories of the dairy herd, (2) an allocated portion of the building investment chargeable to the dairy herd, and (3) the value of dairy equipment.⁸⁴ The interest charge for Danish producers was taken at four per cent of the fire insurance value of the fixed assets. Mr. Costigan objected to allowing interest on current value rather than on original cost, for domestic producers.⁸⁵ His objection was apparently overruled when the President acted in accord with the findings of the other commissioners.

In the straw hat investigation, interest charges were omitted because they could not be accurately computed for Italy.⁸⁶ In the paint brush handles investigation, satisfactory data for neither domestic nor foreign capital investments were available, so the item of investment charge was not included on either side.⁸⁷ In the methanol case, it was found immaterial how or if interest on investment should be included on either side, since the maximum increase in duty was warranted, even so.⁸⁸

In the gold leaf investigation, it was impossible to obtain exact investment data either in Germany or the United States because the industry was so largely a home industry. Estimated capital investment was made, however, for goldbeating shops employing three gold beaters, and the costs of domestic and German producers were approximately the same.⁸⁹

In the pig-iron investigation, a new method of handling interest was seen. Some operating companies owned their own plants, some leased them, and others operated on borrowed capital. In order to obtain uniformity, interest and rent paid were not included, but instead, imputed interest on the depreciated book values of physical plants was calculated at six per cent per annum. Where such depreciated book values were not obtainable, depreciation was deducted from original costs as

⁸⁴ U. S. Tariff Commission, *Butter*, *op. cit.*, p. 30.

⁸⁵ *Ibid.*, pp. 42 and 85.

⁸⁶ U. S. Tariff Commission, *Men's Sewed Straw Hats*, *op. cit.*, p. 18.

⁸⁷ U. S. Tariff Commission, *Paint Brush Handles*, *op. cit.*, pp. 18-19.

⁸⁸ U. S. Tariff Commission, *Methanol*, *op. cit.*, pp. 24-25.

⁸⁹ U. S. Tariff Commission, *Gold Leaf*, (Government Printing Office, Washington, 1926), p. 10.

shown in the books. No assets were included which were not necessary for the production of pig-iron.⁹⁰ Interest was similarly figured in the sodium silicofluoride,⁹¹ cherry (for purposes of determining sulphuring and brining costs)⁹², potassium permanganate,⁹³ cast polished plate glass,⁹⁴ window glass,⁹⁵ and linseed oil⁹⁶ investigations.

In the cheese investigation, interest at six per cent was charged on the value of the herd, herd equipment, and that portion of the farm buildings used directly for the dairy enterprise.⁹⁷ In the onion investigation, each farmer valued his land at the usual market value of farm land in the community, taking into consideration improvements, quality of land, and location with respect to markets and roads. Interest at six per cent was allowed to that portion of the farmer's total land devoted to onion growing. In addition, interest, on borrowed capital, at the same rate, was imputed on the present depreciated value of equipment and work stock used in onion production.⁹⁸ In the milk and cream investigation, interest at six per cent was charged on the average of the opening and closing herd inventories, the opening inventory of that part of the building chargeable to the herd, and on the opening inventory value of the dairy equipment.⁹⁹ Interest on investment was included in the maple sirup cost computation, and interest on sugar equipment, in the maple sugar investigation.¹⁰⁰

In the fluorspar investigation, interest on investment was computed at six per cent for the domestic producers¹⁰¹; interest at six per cent on the book value of the fixed assets of the domestic producing companies was allowed in the rag rug investi-

⁹⁰ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, p. 13.

⁹¹ U. S. Tariff Commission, *Sodium Silicofluoride*, *op. cit.*, p. 10.

⁹² U. S. Tariff Commission, *Cherries*, *op. cit.*, p. 16.

⁹³ U. S. Tariff Commission, *Potassium Permanganate*, *op. cit.*, p. 8.

⁹⁴ U. S. Tariff Commission, *Cast Polished Plate Glass*, *op. cit.*, p. 16.

⁹⁵ U. S. Tariff Commission, *Window Glass*, (Government Printing Office, Washington, 1929), p. 23.

⁹⁶ U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, p. 27.

⁹⁷ U. S. Tariff Commission, *Swiss Cheese*, *op. cit.*, pp. 46 and 51.

⁹⁸ U. S. Tariff Commission, *Onions*, *op. cit.*, p. 44.

⁹⁹ U. S. Tariff Commission, *Milk and Cream*, *op. cit.*, p. 15.

¹⁰⁰ U. S. Tariff Commission, *Maple Sugar and Maple Sirup*, (Government Printing Office, Washington, 1930), p. 28.

¹⁰¹ U. S. Tariff Commission, *Fluorspar*, *op. cit.*, p. 34.

gation;¹⁰² and interest on investment was allowed for domestic producers of flaxseed.¹⁰³ The reason for restricting interest charges to only domestic producers in those investigations was that foreign costs were taken inferentially from invoice prices, and those were assumed to include such charges.

Finally, in the cresylic acid,¹⁰⁴ magnesite,¹⁰⁵ barium carbonate,¹⁰⁶ and egg¹⁰⁷ investigations, interest charges were not included because they were either unobtainable in one or both countries, or because they were not definitely enough determinable.

In summarizing the treatment of the cost element of interest, the commission seemed to follow the practice of computing it on the investment in the industry rather than on the basis of interest paid and/or rentals. In each case, such charge was allowed only for those items used in the production of the article concerned. Furthermore, an attempt was made to have the investment so taken represented by its then-present worth, that is, the depreciated book value of the asset. Interest was not included as a cost item unless it could be included for both foreign and domestic producers. A variation occurred in those cases where foreign invoice prices were used. They were held to include such a charge, so allowance was made for domestic producers in an attempt to secure comparable cost figures.

(2) *Marketing Problems*

In the wheat investigation, it was found that Canadian producers enjoyed a competitive advantage not similarly enjoyed by American producers. Canadian elevator charges were approximately 2½ cents per bushel cheaper than the domestic charges. That was held to fall under subdivision (c) of part 4 and so, was included in the cost comparison.¹⁰⁸

¹⁰² U. S. Tariff Commission, *Rag Rugs*, *op. cit.*, p. 24.

¹⁰³ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 36.

¹⁰⁴ U. S. Tariff Commission, *Cresylic Acid*, *op. cit.*, p. 13.

¹⁰⁵ U. S. Tariff Commission, *Magnesite*, *op. cit.*, p. 17.

¹⁰⁶ U. S. Tariff Commission, *Barium Carbonate*, *op. cit.*, p. 9.

¹⁰⁷ U. S. Tariff Commission, *Eggs and Egg Products*, *op. cit.*, p. 32.

¹⁰⁸ U. S. Tariff Commission, *Wheat and Wheat Products*, *op. cit.*, pp. 12 and

Elevator costs were also included for domestic producers in the flaxseed investigation. Invoice prices, which were compared to domestic costs, were assumed to include such charges.¹⁰⁹

The commission excluded, wherever possible, all marketing and selling costs, a questionable practice, theoretically speaking. Such costs were not deemed to be costs of production by the commission, and it regularly followed the practice of segregating and excluding them, whenever possible.¹¹⁰ In this connection it is interesting to note that in the taximeter investigation, Commissioner Costigan held that marketing costs had not been segregated from the production costs of the Atco meters, and thus, he felt, those costs should not be used.¹¹¹ Commissioners Marvin, Baldwin, and Brossard replied that such costs had been segregated, and that the Atco costs were thereby entirely acceptable.¹¹²

In the magnesite and fluorspar investigations, specific mention was made of the exclusion of selling costs.¹¹³ In the sodium silicofluoride investigation, selling costs were computed, but not used in the final comparisons.¹¹⁴ For potassium permanganate, the per-unit selling expenses were given but not included in the cost of production figures.¹¹⁵

As far as can be determined from the published data, selling expenses were in no case included as a specific item in cost comparisons. Further reference to this will be made below.

(3) *Overheard*

The item of overhead was generally included in the final cost figures, and it covered, among other items, light, administrative salaries, and so forth. However, in some cases, where satisfactory overhead comparisons could not be made, the item was excluded on both sides. An example in point was in the straw hat investigation.¹¹⁶ Likewise, in the print roller investigation,

¹⁰⁹ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 36.

¹¹⁰ *Thirteenth Annual Report of the U. S. Tariff Commission*, 1929, p. 20.

¹¹¹ U. S. Tariff Commission, *Taximeters*, *op. cit.*, p. 10.

¹¹² *Ibid.*, p. 17.

¹¹³ U. S. Tariff Commission, *Magnesite*, *op. cit.*, p. 17 and *Fluorspar*, *op. cit.*, p. 40.

¹¹⁴ U. S. Tariff Commission, *Sodium Silicofluoride*, *op. cit.*, pp. 10, 14, and 17.

¹¹⁵ U. S. Tariff Commission, *Potassium Permanganate*, *op. cit.*, p. 8.

¹¹⁶ U. S. Tariff Commission, *Men's Sewed Straw Hats*, *op. cit.*, pp. 18-19.

comparable and adequate overhead data were found unobtainable, and were therefore excluded altogether.¹¹⁷

In the pig-iron investigation, overhead was characteristically included, and was reported as consisting of expenditures for depreciation, taxes, insurance, office expense, and salaries. Some adjustments had to be made for those plants which carried charges against pig-iron which were properly chargeable against other products.¹¹⁸

With respect to the item of overhead, therefore, the conclusion is reached that it was always included, and properly so, in the final cost figures in all cases where adequate and comparable figures could be secured for both foreign and domestic producers. Also, that overhead was allocated to the commodity being investigated in case such had not been done by the producer.

In addition to the above, depreciation charges were regularly allowed by the commission, as were conversion costs in appropriate investigations, for example, butter. In the onion investigation, one of the cost elements allowed for imported onions was a reconditioning and landing charge. In the pig-iron investigation, a cost element that was considered was the charge for relining furnaces, to mention but a few of the cost elements included in specific investigations as the circumstances demanded.

4) *Price Adjustment*

In the cheese investigation, part (2) of subdivision (c) of the section was brought into action. That part stated that cost differences should regard the differences in wholesale selling prices of such or similar articles in the chief market of the United States. It was found that, on the average, the Swiss product was of substantially higher quality than the domestic variety; the latter usually sold for a price about twenty per cent lower in the United States' markets. As was noted above, several cost figures were submitted to the President in that investigation, but it is impossible to determine which of the several suggesting the maximum duty increase, he used for the purposes of his

¹¹⁷ U. S. Tariff Commission, *Print Rollers*, *op. cit.*, pp. 13-14 and 29-31.

¹¹⁸ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, p. 13.

proclamation.¹¹⁹ Consequently, it is impossible to determine what force this part of the section had, since the cheese investigation was the only one in which it was considered by the commission.

(5) *Tariff Preference*

Only one of the investigations involved Cuba, with whom the United States had a reciprocity treaty, granting its imports a twenty per cent reduction in duty upon entry into the United States. Thus when sugar was the object of a cost study, the question arose as to whether or not the Cuban preferential tariff treatment should be considered as a cost element. It was pointed out that if costs were equalized between domestic and Cuban sugar producers with no allowance made for the duty preference, section 315 would be defeated if the duty found to equalize such costs, should subsequently be reduced twenty per cent in accordance with the terms of the treaty.¹²⁰ As the sugar investigation did not result in a duty change, the final determination of that point was left unsettled.

(6) *Export Taxes*

In the live bobwhite quail investigation, it was found that Mexico had an export tax of 28.5 cents per bird. However, in the final cost figure, that tax was not included as a Mexican cost, probably because even without it, the maximum decrease in duty permissible under the section was warranted.¹²¹

In the peanut investigation, the Chinese export tax on both shelled and unshelled peanuts was included as a Chinese cost element.¹²²

In the flaxseed investigation, the discussion as to whether or not the Argentinian export duty should be considered brought to light the commission's opinion on the matter. When the final report was sent to the President, the tax was not included in Argentinian costs. Commissioners Dennis, Dixon, and Clark

¹¹⁹ U. S. Tariff Commission, *Swiss Cheese*, *op. cit.*, pp. 28-30.

¹²⁰ U. S. Tariff Commission, *Sugar*, *op. cit.*, p. 85.

¹²¹ U. S. Tariff Commission, *Live Bobwhite Quail*, *op. cit.*, p. 2.

¹²² U. S. Tariff Commission, *Peanuts*, *op. cit.*, pp. 47 and 55.

were of the opinion that it should have been. They reasoned that if such a tax were imposed upon exports as a revenue measure, then it should be included as a foreign cost element. If it were found or felt that it was levied to influence the American tariff policy, then it should be denied consideration. The President changed the flaxseed duty in line with the suggestion of the other members of the commission who had excluded the export tax, but no reason was given for so doing.¹²³ It might be added incidentally that by excluding the tax, a greater increase in duty was warranted.

In no other investigation under section 315 upon which the President took action did the matter of export taxes become an issue.

In summarizing the treatment of the so-called "other cost problems" by the commission, certain relatively important points stand out. In the matter of handling the charges for land and equipment used in production, the commission early adopted the policy of including a charge for interest on investment rather than of allowing for interest and rent paid, its initial practice. Interest on the investment was taken only in case it was obtainable on both sides. It was taken for domestic costs only in those cases where invoice prices were used as evidence of foreign costs, since those were assumed to include such cost element. The attempt was made to get the then-present values for the investment used in production, and thus they regularly computed the interest on the depreciated book value of those assets necessarily used in the production of the commodity being investigated. Elevator costs were included, whereas selling and marketing costs were not included unless they could not be successfully segregated and excluded. Overhead was regularly charged, and was allocated when necessary. Depreciation was a regularly considered cost element. As for making adjustment for price differentials, determination of that point was impossible because of the peculiar circumstances in the cheese investigation, the only one in which it arose. In considering tariff preference as a competitive factor, definite action in that connection was, likewise,

¹²³ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, pp. 36 and 41-42.

lacking. Finally, the inclusion or exclusion of the export tax furnished no well defined practice. All in all, the findings seem to further substantiate the earlier conclusion that the administrative action by the commission in section 315 investigations, was guided by the obvious effort to secure representative and comparable cost data.

(f) *Foreign Exchange*—While exchange fluctuations and currency depreciation arose from time to time to vex the commission, curiously enough they were in no case a primary problem. The explanation seems two-fold. Investigations were started following the enactment of the section in 1922, and while instability continued to characterize certain European currencies for several years after that date, those fluctuations became progressively less as one after another of the countries achieved some degree of currency stability. Furthermore, as will be seen below, in the event that exchange problems presented difficulty, it often happened that a maximum increase in duty was warranted whether cost figures were converted at par or at the current rate of exchange.

The sodium nitrite investigation was the first in which the foreign exchange question appeared. In converting Norwegian costs, it was found that the par of exchange between Norway and the United States was four kroner to the dollar, while the then-current rate of exchange was six kroner to the dollar. The commission decided to convert the cost of power in making sodium nitrite at par of exchange, while all other costs were converted at both par of exchange and the current rate. The cost difference with all cost items converted at par was found to be slightly less than would warrant a maximum increase in the duty. If power costs were converted at par and all other costs at the current rate, the maximum increase was at least warranted.¹²⁴ Since the President increased the duty by the full amount permitted, and since that was the only cost element that definitely determined whether he should raise the duty the full amount or not, the fact that he did so seemed to indicate his acceptance of the conversion of power costs at par, and all the other costs at the current rate.

¹²⁴ U. S. Tariff Commission, *Sodium Nitrite*, *op. cit.*, pp. 5 and 8.

The butter investigation gave the commission trouble with respect to foreign exchange. In a preliminary report issued March 11, 1925, it was pointed out that the cost of producing butter in Denmark in kroner for the fiscal year ending April 30, 1924, was approximately four per cent lower than for the previous year, whereas, due to the fall in Danish exchange, the cost in dollars was about nineteen per cent lower in that year than in the year 1922-1923. The question was thus raised whether Danish costs should be converted on the basis of the rate of exchange existing in the year for which the data were collected (May 1, 1923-April 20, 1924), or at an average of the rates prevailing over a period of years, or whether an index figure of the purchasing power of Danish currency in Denmark should be used. At the public hearing, the Danish representatives favored the use of the index figure, or at least, the use of average exchange rates over a period of three years. The three years suggested were 1921-1924, and were the years covered by the commission in its cost collection activities. They had collected basic costs for 1921-1922, and 1922-1923, and costs for 1923-1924 had been computed by applying to the quantities established for 1922-1923, the prices, wages, and so forth, prevailing during 1923-1924. The representatives held that 1923-1924 was not a normal year with respect to exchange rates. Representatives of the domestic industry, however, urged conversion at the rate of exchange current during the year 1923-1924 for which year costs were being compared. The commission, in view of the divergence of opinion, decided it was necessary to investigate the history of Danish currency fluctuations and exchange movements since the war in order to determine whether or not 1923-1924 was a normal year in that respect.

While not commenting on their findings, as a result of their investigation the commission reported that Danish exchange movements had fallen into four definite phases from May, 1919, to the close of 1925. The first period, from May, 1919, to November, 1920, showed a rapid fall in the rate of Danish exchange. The second period, from November, 1920, to June, 1922, showed a gradual upward trend with an improvement of 61.52 per cent at the close of the period. The third period, from

June, 1922, to March, 1924, showed a gradual and continuous decline. That period covered the one used in the cost investigation. The fourth period, from March, 1924, to the end of 1925, showed a strong upward movement, so that at the close of the period the exchange value of the krone was within 7.23 per cent of par.

When the final cost figures were presented by the commission, the figures for Denmark were given on two bases: costs were converted for the farm accounting year 1923-1924 at the average rate of exchange, and for the three years 1921-1924, at the average rate of exchange. For the first base, Danish costs, including transportation to New York, were found to be 41.11 cents per pound, while for the second base, the cost was found to be 44.14 cents.¹²⁵ That explained, apparently, why the Danish representatives wanted at least the three year average taken, and why the domestic producers wanted costs converted at the 1923-1924 rates of exchange.

The majority of the commission favored the use of the three year average. They said that during the period 1921-1924, kroner costs had fallen about sixteen per cent, and that during the year 1923-1924, exchange had also fallen. The coincidence of falling costs and exchange rates, they felt, was reason enough to justify the use of a wider exchange basis than that of the single farm accounting year for which costs had been taken. The subsequent rise in exchange, they felt, other things remaining the same, should result in lowered costs, which could conceivably result in an adjustment between costs and exchange rates with a real cost "not substantially different from that existing before the rise in exchange."¹²⁶

The cost of production difference found, if the three year average were taken for converting Danish costs, was 11.90 cents. The prevailing rate of duty on butter was eight cents per pound, and the maximum duty possible was thus twelve cents.

Commissioner Brossard favored converting Danish costs at

¹²⁵ U. S. Tariff Commission, *Butter*, *op. cit.*, pp. 50-55 and 58.

¹²⁶ *Ibid.*, pp. 71-72.

the average rate for the year 1923-1924 which would have resulted in a cost difference of 14.95 cents per pound.¹²⁷

Commissioner Costigan pointed out, in his dissenting opinion, that still another alternative was open to the commission, namely, the use of a monthly moving average for exchange rates for twenty-one months starting from January, 1919. That would have reduced the found difference from 11.92 cents to 10.27 cents per pound.¹²⁸

Four different cost figures were submitted to the President, three of which indicated at least the maximum duty increase. Of these three, two had exchange rates converted for the year 1923-1924, while the third used the average of the three year period. The President increased the duty by the full amount allowable, but since three different combinations warranted such action, which of them really influenced the President can not be determined.

A foot-note to one of the cost tables in the gold leaf investigation was the next mention made of the foreign exchange problem: "In previous investigations, the commission has converted foreign currencies by using average daily quotations of the exchange rates. That practice if followed in this investigation would slightly decrease the converted German costs, since par value of the rentenmark was assumed in deriving the above figures from marks."¹²⁹ No adjustment was made for the so-called "slight" difference, apparently, because the maximum duty increase was more than warranted even so. But the quotation is of value as it indicated the method used by the commission in its exchange conversions in those numerous cases where such conversions had to be made, and where no special mention was made in the commission's reports as to the practice it had followed. The practice followed by the commission was, therefore, to effect conversion by the use of average daily exchange quotations.

In the cheese investigation, the Swiss cost data were converted into dollars at the average of noonday buying cable rates

¹²⁷ U. S. Tariff Commission, *Butter*, *op. cit.*, p. 61.

¹²⁸ *Ibid.*, pp. 85-88.

¹²⁹ U. S. Tariff Commission, *Gold Leaf*, *op. cit.*, p. 8.

for the crop year May, 1923, to April, 1924, the period for which costs were collected. The commission considered using average exchange rates for a longer period, but decided that in doing so, the result would not be materially altered.¹³⁰

Similarly, in the magnesite investigation, it was noted that the foreign currencies were converted to dollars at the average of the daily noon buying cable rates, for the year 1924, the period for which costs were taken.¹³¹ In the cherry investigation, Italian costs were converted for the cost period on the basis of the average exchange rate prevailing during the cost period of May, 1926, to April, 1927, of 4.07 cents per lira. However, it was found that lira exchange in that period had increased almost seventy per cent, so an adjustment was made on the basis of 1923 prices when more normal conditions prevailed.¹³²

In the rag rug investigation, costs and charges in the invoice prices, used as evidence of Japanese costs, were expressed in yen. Those were converted at the average exchange rate for the first five months of 1925, the period for which the invoice data were obtained.¹³³ In the barium carbonate investigation, German costs were converted at the exchange rate of 23.8 cents per mark. It was pointed out that in October, 1923, the German Rentenbank was established, and the rentenmark was given a gold value of 23.8 cents. The domestic value of the mark was held to have been fairly stable during the latter part of 1923 and all of 1924. In November, 1924, the creation of the reichsmark, with a gold value of 23.8 cents, provided stability for German exchange both internally and externally from that date to the time the commission's report was being written.¹³⁴

The Danish cost data in the sodium silicofluoride investigation were converted at the average of New York noonday buying cable rates for the krone in the years 1924 and 1925, the period covered in the investigation.¹³⁵ In the onion investigation, costs in pesetas were converted into American dollars

¹³⁰ U. S. Tariff Commission, *Swiss Cheese*, *op. cit.*, pp. 14-15.

¹³¹ U. S. Tariff Commission, *Magnesite*, *op. cit.*, p. 18.

¹³² U. S. Tariff Commission, *Cherries*, *op. cit.*, pp. 28-30.

¹³³ U. S. Tariff Commission, *Rag Rugs*, *op. cit.*, p. 22.

¹³⁴ U. S. Tariff Commission, *Barium Carbonate*, *op. cit.*, p. 10.

¹³⁵ U. S. Tariff Commission, *Sodium Silicofluoride*, *op. cit.*, p. 13.

on the basis of the rate of exchange actually paid as shown on the importer's books of record.¹³⁶ In the cast polished plate glass,¹³⁷ peanut,¹³⁸ egg and egg products,¹³⁹ flaxseed,¹⁴⁰ window glass,¹⁴¹ and linseed oil¹⁴² investigations, the foreign costs were converted at the average rate of exchange existing during the period when foreign costs were collected, or at the average exchange rate existing on the date of the invoices, when such were used in place of actually compiled foreign costs.

In the potassium permanganate,¹⁴³ whiting,¹⁴⁴ and precipitated chalk¹⁴⁵ investigations, costs were converted at the par of German, Belgian, and British exchanges, respectively.

From the above discussion, several observations are derivable. First, it seemed the policy of the commission to convert costs at the average rate of exchange as found during the period when foreign cost data or foreign invoice prices were taken, that being the general policy with but one exception.

Second, in cases where that method was not followed, costs were converted at the par of exchange, investigation having shown that exchange rates during the cost period had been approximately at par.

Third, in cases where the first method was used exchange rates might need some adjustment as was done in the case of cherries. The infrequent need to adjust exchange rates is perhaps explained by the efforts of the commission to select a normal period for cost collection, thus largely obviating the need for adjustment.

One other observation can be made. One of the European currencies that fluctuated most in the post-war period was the French franc. No investigation under section 315 proceeded with France the chief competing country. On the other hand,

¹³⁶ U. S. Tariff Commission, *Onions*, *op. cit.*, p. 58.

¹³⁷ U. S. Tariff Commission, *Cast Polished Plate Glass*, *op. cit.*, p. 19.

¹³⁸ U. S. Tariff Commission, *Peanuts*, *op. cit.*, p. 21.

¹³⁹ U. S. Tariff Commission, *Eggs and Egg Products*, *op. cit.*, p. 26.

¹⁴⁰ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 27.

¹⁴¹ U. S. Tariff Commission, *Window Glass*, *op. cit.*, p. 22.

¹⁴² U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, p. 38.

¹⁴³ U. S. Tariff Commission, *Potassium Permanganate*, *op. cit.*, p. 6.

¹⁴⁴ U. S. Tariff Commission, *Whiting or Ground and Precipitated Chalk*, (Government Printing Office, Washington, 1930), pp. 11 and 26.

¹⁴⁵ *Ibid.*

Germany led all the others in being selected as the chief competing country. However, in the early investigations in which Germany figured, the cost differences found were so excessive, generally, that even a maximum increase in the duty failed to equalize costs when those were converted for the period of the cost gathering. Also, as noted above, the German currency achieved relative stability in October, 1923, whereas, the first report in which Germany figured (barium dioxide) was not presented to the President until May, 1924.

(g) *Part Time Operation*—Although the question as to whether plants operating only at partial capacity should have their costs adjusted to full capacity when being studied in connection with an investigation came up in only a small number of cases, it is interesting to note the commission's treatment. In the sodium nitrite investigation, costs of the American producers were based in one instance on a plant whose capacity was considerably below normal, while foreign costs were for normal production. Such a situation was held by Commissioners Culbertson, Lewis, and Costigan as constituting a "difference in the conditions of production" which should be taken into consideration when determining cost differences. However, they found that even when the costs of the plant were adjusted to average production, which was approximately normal, the maximum increase in duty was warranted.¹⁴⁶

In the potassium chlorate investigation, as was noted above, two of the three companies whose costs were taken were not producing at all during 1923. Even so, they were allowed to submit estimated costs for operation at two-thirds capacity for the first six months of that year based upon their adjusted, actually-experienced costs during the similar part of 1922.¹⁴⁷ No statement was made in explanation thereof.

Those two restricted cases in which the point of under capacity operation was involved, provided practically no precedent for dealing with the problem, especially since the maximum duty increase was more than warranted in each case, regardless. However, in the 1929 report of the Tariff Commission, the

¹⁴⁶ U. S. Tariff Commission, *Sodium Nitrite*, *op. cit.*, pp. 9-10 and 12-16.

¹⁴⁷ U. S. Tariff Commission, *Potassium Chlorate*, *op. cit.*, p. 5.

statement was made that in domestic plants operating on part time, unit costs of production were found, naturally, to be much higher than they otherwise would have been. But the commission, in such cases, would distinguish between low-operating conditions, due to inefficient management or an antiquated plant, and those due to competition from imports.¹⁴⁸ That, presumably, indicated the treatment the commission would have given the problem if it had been called upon to do so.

(h) *By-Products and Joint Products*—In three cost investigations, the commission was faced with the problem of collecting costs for by-products. It was found that wheat feeds were a by-product of flour-milling, and that any return from them was usually deducted from the cost of producing the flour. Thus, as evidence of their costs of production, consideration was given only to the differences in milling, administration, and selling costs.¹⁴⁹

In the butter investigation, the question again arose in connection with the inclusion or exclusion of the costs of production of Nebraska butter, which butter was generally known to be a by-product. Because of that fact, it was found practically impossible to obtain accurate costs of production. Commissioners Dennis and Costigan expressed doubt as to the wisdom of including the Nebraska costs because of their unrepresentativeness.¹⁵⁰ Again, it is impossible to discover how this situation was disposed of. Four different cost figures were submitted to the President by the commission. The first one was the cost difference between all domestic costs and Danish costs converted at the average exchange rate for the year 1923-1924, which was 14.95 cents. The second was the cost difference between all domestic costs and Danish costs converted at the average exchange rate for the three year period 1921-1924, which was 11.90 cents. The third was the cost difference for domestic costs excluding the Nebraska costs and Danish costs converted at the 1923-1924 exchange rates, which 13.57 cents.

¹⁴⁸ *Thirteenth Annual Report of the U. S. Tariff Commission, 1929*, p. 20.

¹⁴⁹ U. S. Tariff Commission, *Wheat and Wheat Products*, *op. cit.*, pp. 23, 36, and 44.

¹⁵⁰ U. S. Tariff Commission, *Butter*, *op. cit.*, p. 36.

The fourth was the domestic costs excluding the Nebraska costs and Danish costs converted for the three year period, which was 10.58 cents.¹⁵¹ The President subsequently increased the duty the full amount, from eight cents to twelve cents per pound, but in so doing it is impossible to say which of the cost differences he accepted of the three which necessitated the maximum increase.

The casein investigation failed because of the commission's inability to get either domestic or Argentinian costs for the chief raw material of skimmed milk which was a by-product of the dairying industry.¹⁵²

The conclusion derivable from the commission's handling of the matter of by-products is, therefore, that it attempted to derive a representative cost for such, but if not able to do that, it suggested, properly, that the investigation not be used as the basis for a duty change.

The five investigations dealing with methanol, linseed oil, phenol, cresylic acid, and barium carbonate were examples of how costs were computed for commodities found to be joint products.

It was found that methanol was produced in the United States jointly with two other products: acetate of lime and charcoal, but in Germany it was made as the only product of a synthetic process. It was thus necessary, in order to find methanol costs, to assign to that product a part of the joint costs incurred in producing the three products. The part assigned was in the ratio that the sales return from methanol bore to the total sales return from the three products.¹⁵³ The same method of sales allocation was used in determining the costs of crude oil in the linseed oil investigation, from those of the joint production of crude oil and cake.¹⁵⁴

Cresylic acid and phenol are joint products of the same manufacturing process. The regular procedure was followed in sepa-

¹⁵¹ U. S. Tariff Commission, *Butter*, *op. cit.*, p. 60.

¹⁵² U. S. Tariff Commission, *Casein*, *op. cit.*, p. 28.

¹⁵³ U. S. Tariff Commission, *Methanol*, *op. cit.*, p. 27.

¹⁵⁴ U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, pp. 28-29.

rating their joint costs by use of the sales allocation method,¹⁵⁵ as was also done in the case of barium carbonate.¹⁵⁶

The practice set up by the commission, and followed in all cases for dealing with joint products was, therefore evident, and justified, as well.

¹⁵⁵ U. S. Tariff Commission, *Cresylic Acid*, *op. cit.*, pp. 12-13 and *Phenol*, *op. cit.*, pp. 7-8.

¹⁵⁶ U. S. Tariff Commission, *Barium Carbonate*, *op. cit.*, p. 9.

VII

OPERATION OF SECTION 315 (*Concluded*)(3) *Comparability*

The particular words of the section which are to be considered next, are those which stated that investigations were to be made between foreign and domestic costs of production of "like or similar" articles.

In many of the investigations, the comparability of the domestic and foreign products was not difficult to establish beyond any doubt, on the part of the commission.

In the live bobwhite quail investigation, the problem of establishing satisfactory comparability was met in a mild form. Mexican quail were found to be smaller and of lighter color than the domestic variety. Leading ornithologists were asked to advise the commission, and they were in substantial agreement that the domestic and Mexican quail were of the same family in spite of the differences noted.¹

Another aspect of the problem was experienced in the print roller investigation. Complete comparability of foreign and domestic products existed, apparently, but still, not all domestic producers had their costs taken. It was found that print rollers were made in two different types of factories in the United States: contract shops and wall-paper mill shops. In an examination of the separate average costs of these two groups of producers, it was found that the costs of the latter were thirty-three per cent higher than those of the former. That led the commission to enquire why such a cost difference existed. Two reasons were advanced as possible explanations. First, the paper mill rollers might be broadly different from those made in the contract shops. Second, their manufacture in shops owned and controlled by paper-mill companies might afford advantages largely independent of cost considerations. They then found that either or

¹ U. S. Tariff Commission, *Live Bobwhite Quail*, *op. cit.*, p. 3.

both of those causes were present to some degree in all the mill shops. Such high cost shops, the commission held, were not to be included within section 315 investigations; such were not the competitive costs the statute was meant to equalize. For a sufficient reason, their production was continued although other domestic rollers were made at a third less cost. Obviously, if their costs were higher than those of the domestic contract shops, they were higher than the costs of the German rollers. Such high cost rollers, therefore, seemed to the commission to be withdrawn from the competitive field. The above conclusion was not based upon evidence that the rollers were physically different from those made elsewhere although there was some evidence of that. Whatever the reason for their continued production, it was evident that that was not determined by competition in cost.

They further held that the "plain purpose of section 315 is that the competitive strength of the foreign and of the domestic producers shall be equalized insofar as such competitive strength is dependent upon costs of production. Costs not competitive in their nature ought not to be considered on either side. Costs incurred independently of the conditions ordinarily determining whether production is to be continued or not are not a just measure of the general cost level in the two competing countries."

The commission analyzed the costs of the paper mill shops, and discovered that only two of them had costs which in no way could be considered in the competitive field with the costs of the contract shops. Thus, the majority of the commission reported a cost difference to the President which included all foreign producers and all domestic producers except the two especially high cost mill shops.² Commissioner Costigan objected to that finding, and held that the average higher costs of the paper mills was sufficient evidence that they should all be excluded from cost consideration, in which event a decrease, rather than an increase, in the duty would be warranted.³ The President, however, accepted the findings of the majority of the commission.

The taximeter investigation furnishes still another aspect

² U. S. Tariff Commission, *Print Rollers*, *op. cit.*, pp. 9-10.

³ *Ibid.*, pp. 15-24.

of the problem. It was found that four domestic companies were engaged in the production of that article, but that two of them produced meters which were not comparable to the imported product. The commission thus took the costs of only the two domestic companies whose meters, even though not physically identical with the imported meters, performed comparable functions and served the same use to taxicab operators and patrons.⁴

Similarly, it was found necessary to confine the linseed oil investigation to crude linseed oil, since that was found to be, practically, the only grade of oil imported, and it was further found that the imported and domestic crude linseed oils were of the same quality and grade.⁵

In the paint brush handle investigation, costs were collected for eighty domestic styles, but it was found that only fifty of these had comparable imports so only their costs were taken.⁶

In the rag rug investigation, costs were collected for three varieties, but it was stated in the commission's report that those of the "hit-and-miss" type were more directly comparable with "hit-and-miss" domestic rugs than were the other types of domestic and imported rugs.⁷ While there was disagreement in the commission on the point, the President decided it by proclaiming a duty change for only those rugs.

In the onion investigation, it was found that all the imported onions were of the mild type. Spanish costs were therefore compared with costs of production for domestic Spanish and Bermuda types, the only mild types grown in the United States.⁸

In the peanut investigation, imports were found to be solely of the Virginia type, so domestic costs were collected for that type, and the Spanish type was not included. Furthermore, it was found for unshelled peanuts that Chinese imports were entirely of three grades: 11/12, 12/13, and 13/14, and that those were comparable to the domestic Virginia peanuts of the Jumbo grade. Thus cost comparisons were made only for those types.⁹

⁴ U. S. Tariff Commission, *Taximeters*, *op. cit.*, p. 4.

⁵ U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, p. 2.

⁶ U. S. Tariff Commission, *Paint Brush Handles*, *op. cit.*, p. 2.

⁷ U. S. Tariff Commission, *Rag Rugs*, *op. cit.*, p. 20.

⁸ U. S. Tariff Commission, *Onions*, *op. cit.*, p. 61.

⁹ U. S. Tariff Commission, *Peanuts*, *op. cit.*, pp. 50-51.

As for shelled peanuts, the cost comparison was made between Chinese peanuts of the 30/32 and 38/40 grades, and domestic peanuts of the Extra Large and No. 1 types in order to secure the greatest degree of comparability.¹⁰

The butter investigation proved very difficult from the standpoint of comparability. The debate centered around the disposition of centralizer butter costs. Such butter was usually made in centralizer factories which secured cream from widely scattered sources. The cream, shipped long distances, for the most part, was usually sour upon reaching the factory, and so, had to be subjected to special manufacturing processes before being churned. Furthermore, centralizer butter was found to score only 89 points compared with 92 points for cooperative and independent butter, which latter types were held directly comparable to the imported product. Four members of the commission favored the exclusion of centralizer butter costs, the other two urged their inclusion to secure a "national cost", holding that it would not be within the meaning of the section to exclude the costs of butter which constituted approximately one-half of the domestic output. They cited the small difference in price between the two grades, and held that if centralizer butter were included in the cost study, no duty change would be indicated.¹¹ The President proclaimed the maximum increase in duty so he, apparently, agreed to the exclusion of centralizer butter costs, again, apparently, on the ground that sufficient comparability did not exist between that butter and the imported product.

Finally, there were those investigations in which the commission established comparability in still another manner. The gold leaf investigation is in point. The imported German product was found to be thinner, paler, and of less purity and metallic value than the domestic product. However, evidences of comparability in use between the two were definitely found to exist. Bookbinders used both varieties, and the difference in results was hardly noticeable. Both were equally useful in

¹⁰ U. S. Tariff Commission, *Peanuts*, *op. cit.*, pp. 66-67.

¹¹ U. S. Tariff Commission, *Butter*, *op. cit.*, pp. 23-26, 62-65, 68-70, 79-80, and 88.

stamping badges, pencils, and hatbands. The domestic product was found to enjoy some preference in inside and out-of-door sign painting. The commission finally reported, unanimously, that the two products met in competition, and while they were not physically comparable, there was a direct trade or use comparability.¹² The President agreed to their findings.

Summarizing the results of the manner in which the question of comparability was handled by the commission, the following can be said. In all investigations in which it was possible, costs were collected for all domestic producers, or a representative portion of them, for comparison with the costs of the like or similar imported product. That was done only where the entire domestic product was entirely comparable with that imported. If such complete comparability could not be definitely established, the commission logically called upon outside expert advice to determine it for them.

Then if costs of all domestic producers of a given commodity, like onions, were not collected, the investigations were restricted to that portion of the total production which was comparable to the imports. Under such a procedure, costs were compared, not for all producers, but for those producing the article comparable, physically and functionally, with the imported article.

If physical comparability had to be waived that was done, and the cost comparison was finally made between products which were comparable in function and served equally well to satisfy domestic demand.

Over and above all these, in no investigation would costs be taken for unusually high cost producers, since those were inferred to be enjoying some other advantage in production. In the event of not knowing why they continued production under such high costs, it was assumed that the article was not completely comparable to that of the other lower cost producers, and that section 315 was meant to have regard only for those producers whose costs were competitive in nature.

(4) *Transportation Costs*

Of all the problems that arose in connection with the adminis-

¹² U. S. Tariff Commission, *Gold Leaf*, *op. cit.*, pp. 6-7.

tration of section 315, none gave the commission any greater difficulty than that of transportation costs. There was nothing specific in the section directing their exclusion or their inclusion. However, under subdivision (c) there was the definite opportunity to include or exclude them, as the case might be, under the provision that "all other disadvantages or advantages in competition" should be considered in arriving at the final differences in costs of production.

In the first investigation the question arose to concern and divide the commission. It was found that Canadian wheat in moving to the head of the Great Lakes enjoyed a reduction in the existing transportation rates of three cents per hundred pounds. That preferential treatment was the result of the Crow's Nest Pass agreement between the Dominion Government and the Canadian Pacific Railway, made in 1897. In return for the right given the railroad to build its line through the Crow's Nest Pass from Lethbridge into British Columbia, plus a government subsidy of \$3,500,000 and a land grant, the railroad agreed to reduce its eastbound rates to the Lakes by three cents per hundred pounds. The agreement was abrogated by the Canadian government for three years ending July 5, 1922, but was then reinstated.¹³

The question was whether or not the advantage of Canadian grain under the Crow's Nest Pass agreement should be considered or not. The commission reported that it was impossible to predict how long the agreement would continue in force.¹⁴

Commissioners Marvin, Glassie, and Burgess opposed the inclusion of the transportation costs, holding the authority to include such costs was open to grave doubt. If they were included to place domestic and foreign producers on a parity in each consuming market, they pointed out that those producers enjoying a geographical advantage would, thereby, lose it. Furthermore, the inclusion of such costs was apparently not intended by Congress, since they had changed the words of the section to read "differences in costs of production" in place of "differences in conditions of competition." They quoted

¹³ U. S. Tariff Commission, *Wheat and Wheat Products*, *op. cit.*, pp. 14-15.

¹⁴ *Ibid.*

Senator McCumber during the Congressional debate on the subject as saying that: "in the authority to take into consideration matters which shall guide the President's judgment, we have left out of that consideration entirely the question of transportation. Of course, the question of transportation necessarily does figure in the question of competition; but no one wished to give the President the power to take every unimportant article that is produced in a section of the country so far distant that the freight itself would be many times what the article would be worth in the field of consumption under the ordinary tariff duties." They held that the fact that Senator McCumber had noted the apparent omission of transportation costs from subdivision (c) was deliberate, and was not due to inadvertance or the belief that the authority was indirectly covered by other or general language, and that his statement was not challenged was sufficient indication of the legislative intent not to have such costs included. While they recognized that legislative statements were not to be taken as construction of the law in all cases, they felt that when the senator in charge of a bill had spoken on the issue raised, and had not been contradicted, such statement should be considered as interpretative of Congressional intent.¹⁵

Commissioners Culbertson, Lewis, and Costigan were in favor of the inclusion of the transportation costs, although they referred to this item as "what may be fairly regarded as, in effect, a bounty from the Canadian government."¹⁶ As the President proclaimed the duty change as suggested by the last three commissioners, he indicated acceptance of the inclusion of transportation costs. However, since the rate reduction could be considered as a bounty, it was possible for him to accept its inclusion without appearing to settle the question of whether transportation rates, which were not of such a nature, should be included or not.

In the following six investigations, the maximum duty change permissible under the section was warranted whether transportation costs were included or not. In the taximeter investigation, the question was not so easily disposed of. There it was

¹⁵ U. S. Tariff Commission, *Wheat, op. cit.*, pp. 32-34.

¹⁶ *Ibid.*, pp. 42-43.

found that if transportation costs were excluded, the duty necessary to equalize the found cost difference would have had to have been \$3 per meter, and 27.1 per cent ad valorem on the American selling price, if excluded, \$3 and 26.2 per cent. Commissioners Marvin, Baldwin, and Brossard favored their exclusion, Commissioner Dennis, their inclusion.¹⁷ No discussion over the point was reported, and no explanation of how the figures were arrived at was given. The President proclaimed the higher duty, thus indicating his agreement to the exclusion of those costs.

The President was faced with the same situation in the next investigation. If transportation costs were to be included in determining the cost difference for men's sewed straw hats, one duty was necessary, if they were to be excluded, another duty was necessary. That report was presented to him on July 17, 1925, but he did not act upon it until February 12, 1926. On October 13, he wrote to the Tariff Commission for a full statement of its reasons for and against the inclusion of transportation costs for the purpose of section 315 investigations. The commission's report was delivered to the President on November 17.

With respect to the reasons favoring the inclusion of such costs, the commission enumerated the following. First, that statutes, if clear, must be interpreted in accordance with their meaning as written. It was held that section 315 was clear and unambiguous in its meaning, all of which meant "that not only are technical production costs to be assembled, but also, that, in the fields of both production and commerce, transportation furnishes one of the conditions of production, and manifestly one of the 'advantages or disadvantages in competition' which, not being excluded by any language of the subdivision or section, is necessarily embraced among the factors which, under that section, must be taken into consideration by the President."

In the second place, all parts of the section should be given effect by harmonious construction. To do that, all the factors of competition should be considered "insofar as practicable", and one of those factors was held to be transportation costs.

¹⁷ U. S. Tariff Commission, *Taximeters, op. cit.*, pp. 5 and 20.

Next, it was pointed out that the section was repleat with restrictions on the President's power thereunder, such as his inability to raise or lower existing rates by more than 50 per cent, his inability to transfer a commodity from the free list to the dutiable list, and so forth. Thus, with all that careful safeguarding, it was argued that the specific denial of the consideration of transportation costs being absent from the terms of the section, must be construed to mean "that the power in question continues to reside in the President under the sweeping language of subdivision (c) of section 315."

The President's wheat proclamation, in which he followed the recommendations of those commissioners favoring the inclusion of transportation costs, was cited as a weighty executive construction of the law.

A Supreme Court decision was also cited in connection with the use of Congressional debates as appropriate guides in interpreting statutes. That decision said in part that "all that can be determined from the debates and reports is that various members had various views and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein."¹⁸

President Harding's message to Congress of December 6, 1921, was taken to indicate that that most conspicuous official advocate of the flexible tariff intended its use not to erect a prohibitory tariff wall, but to promote the increasing interchange of commodities between the United States and foreign countries. It was held that tariff rates measuring only technical costs of production, and omitting the consideration of transportation advantages and disadvantages would result, in instances, in the debarring of foreign goods from any competition whatever in the American market.

Senator McCumber was also quoted as saying that the essential purpose of the section was "equal opportunity of competition in the American markets", which statement was held to reaffirm President Harding's stand that the tariff was not meant to be an embargo against international commerce.

¹⁸ United States v. Trans-Missouri Freight Assn., 166 U. S. 290 (1896).

The substitution of the phrase "costs of production" for "conditions of competition" because the former was thought to be more definite for constitutional reasons was held not to invalidate the inclusion of transportation costs under subdivision (c), which was meant, it was held, to include all statistically measurable advantages and disadvantages in competition. If such was not meant, it was difficult to justify the inclusion of this subdivision, since subdivision (a) would have given sufficient effect if only technical costs were to have been considered.

Finally, several economic arguments were given for the inclusion of transportation costs. It was held that any two products could not compete unless brought to a common market, and thus "production" was deemed to include not only rearrangement of the material, but the serviceable movements of goods from one place to another for the satisfaction of human wants. Several economists were quoted in the common statement of theory that production is the creation of time, place, and form utilities which infers the inclusion of transportation costs in the determination of any complete cost of production figure.¹⁹

The arguments against the inclusion of such costs were as follows. The words "cost of production" did not, when used in the ordinary sense, include transportation costs. In that connection, a Supreme Court decision was quoted—"no distinction is more popular to the common mind—than that between manufacture and commerce. Manufacture is—fashioning of raw material into form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce—."²⁰

In the second place, the intrinsic distinction between production and the subsequent transportation and marketing of the things produced shown by the ordinary use of the words, was recognized and confirmed by the language of economic and legal sciences. It was pointed out that in recognized texts on econ-

¹⁹ U. S. Tariff Commission, *Transportation Costs and Costs of Production*, (Government Printing Office, Washington, 1926), pp. 9-36.

²⁰ *Kidd v. Pearson*, 128 U. S. 1 (1888).

omies, the factors of production, the organization of production, and so forth, were treated under the heading of production while those dealing with exchange, price, and transportation were considered under another heading. Those topics were held to relate to the exchange of products, and not to the factors which combine to produce them.

It was held next that the legislative history of the act negated any suggestion of possible intent to depart from or enlarge the meaning of the term "cost of production". Numerous examples were given to prove that that phrase meant a process which stopped "at the works", that is, that production ceased when the goods were ready for sale at the factory, and that transportation could not thus be included as a part of production.

Also, it was held that the inclusion of transportation costs rested on inference in connection with subdivision (c). Nothing specific was said about the matter. For example, should such costs be added to the foreign article only, or to both the foreign and the domestic articles, and if so, how should it be done. The failure of Congress to point out what should be done on such an important point, indicated that Congress did not intend that anything should be done.

Furthermore, subdivision (c) meant that all the items mentioned there should be considered, but only in the determination of the definite standard of "costs of production." Those were not meant to bring into consideration items other than the ones definitely connected with the cost of actually producing the article.

The consideration of wholesale prices under subdivision (c), was held not to mean the inclusion of items going to make up such a price in the compilation of costs of production. Rather were such prices to be used when definite costs could not be determined, and then worked back to the costs of production.

The difficulty of administering the section if such costs were to be included was suggested, and the constitutionality of appropriating such powers as would be needed if such were to be done was doubted.

Next, it was held that the section was adopted to equalize costs of production, and not conditions of competition in general,

the latter policy having been discarded by Congress in the finally enacted section.

Finally, they pointed to the Congressional debate on the subject. They cited the responsible chairman as saying transportation costs were not to be included, and his statement had not been challenged.²¹ Then followed a detailed account of the Congressional debate on the point.

The commission's report was sent to the Attorney General by the President, who asked his opinion on the question. On February 2, 1926, in replying, he held that if the President had been meant to equalize only costs of production, that is, costs of fabrication, that that would have been provided for in subdivision (a). But with the addition of subdivision (c), the things enumerated there were to be also considered in determining costs when it was found practicable to do so. If differences in transportation costs resulted in "advantages or disadvantages in competition", the President was directed by that subdivision to consider them insofar as was practicable.

The argument that clause (4) applied only to clause (3) was not sustained by the Attorney General. That is, that the advantages or disadvantages in competition should have only been considered in connection with the advantages granted to a person, corporation, and so forth, by a foreign government. He held that the intention of the statute had to be taken from the entire statute, and not a part of it, and that any part of it applied to all parts of it rather than to just one or a few parts.

With respect to considering the legislative debate as interpreting the statute, he held that such could be done only in order to solve the doubt and not create it. The views of the opposing interested parties, he felt, indicated that doubt was created in considering the legislative debate. He went on to say that "while much may be said on both sides as to the intent of Congress, an examination of the legislative history of section 315 does not disclose the legislative intent with any degree of certainty. It does disclose a diversity as to the meaning of the language of the statute." He then quoted the decision of the *Trans-Missouri Freight* case given above.

²¹ U. S. Tariff Commission, *Transportation Costs and Costs of Production*, *op. cit.*, pp. 39-63.

In speaking on the wheat proclamation, he held that even if the advantage of the Canadian producers had been taken into consideration because it was in the form of a bonus, and thus came under clause (3), the consideration of the cheaper elevator charge in Canada which was included in the final cost figure could not have come under that clause, but must have come under clause (4) as an advantage in competition. "It can not be soundly contended that effect should be given to clause (3) and denied to clause (4)." He further held that the President would not be greatly assisted in his duty to equalize the differences in costs of production between the imported and the domestic product in the principal competing markets of the United States, if he were furnished with only the costs of fabrication by the commission. He declared the section to be remedial in character, and thus liberal construction should be granted to it in order to accomplish that purpose.

He concluded by saying that under 315 (a), the President was directed to establish a duty which would equalize domestic and foreign costs of production. And that "Section 315 (c) enumerates the factors which the President shall take into consideration in ascertaining such differences in costs of production, and in fixing the proper rate to equalize the same. In the performance of this statutory duty he should, by virtue of clause (4) subdivision (c), take into consideration, insofar as he finds it practicable from an analysis of the facts in each case, costs of transportation, whenever it is shown that such costs or differences therein, as between foreign and domestic articles, constitute an advantage or disadvantage in competition between the foreign and American producers."²²

Ten days after the delivery of the opinion to him, the President proclaimed the duty change for men's sewed straw hats with transportation costs for the Italian hats to New York, the center of the domestic industry and the domestic market for both, included as a cost item.

In the butter investigation is to be found the first statement as to the method followed by the commission in computing trans-

²² U. S. Tariff Commission, *Transportation Costs and Cost of Production*, *op. cit.*, pp. 89-94.

portation costs. The freight rate from each of the sixteen centers for which costs were obtained was established to New York. Those were averaged, and each one weighted by the butter equivalent of the quantity of butterfat sold in each of the areas as given in the 1920 census.²³ Danish costs were arrived at by adding together the railroad charge from a representative local shipping point to the nearest port of export, cartage from cars to warehouse, cartage from warehouse to vessel, harbor charges, ocean freights from Copenhagen to New York, and miscellaneous charges, such as consular fees and so forth.²⁴

Considerable variation is to be noted in the manner in which the commission handled transportation costs thereafter. In some investigations, nothing definite can be learned as to the method used because of the commission's inability to disclose confidential information. In others, the procedure followed was immaterial as the maximum duty increase was warranted even so, for example, in the fluorspar, methanol, and gold leaf investigations, among others.

In the cast polished plate glass case, transportation costs for both foreign and domestic producers were weighted by the shipments actually made, and then averaged.²⁵

In the cherry investigation, Italian costs were arrived at by weighting the average costs by the amount shipped. That was done for that part of the domestic product moving to San Francisco; for the part moving to New York, the rates were weighted by production.²⁶

In the paint brush handle investigation, the domestic rates were weighted by sales, while those of the foreign producer did not need any weighting, since there was only one producer whose costs were taken.²⁷

For barium carbonate, domestic costs were weighted by production, foreign costs, by shipments.²⁸

²³ U. S. Tariff Commission, *Butter*, *op. cit.*, pp. 31-32.

²⁴ *Ibid.*, p. 42.

²⁵ U. S. Tariff Commission, *Cast Polished Plate Glass*, *op. cit.*, p. 25.

²⁶ U. S. Tariff Commission, *Cherries*, *op. cit.*, p. 24.

²⁷ U. S. Tariff Commission, *Paint Brush Handles*, *op. cit.*, p. 13.

²⁸ U. S. Tariff Commission, *Barium Carbonate*, *op. cit.*, p. 14.

In the flaxseed²⁹ and rag rug³⁰ investigations, the domestic freight rates were weighted by production figures, and since those were both investigations in which foreign costs were evidenced by invoice prices, those were taken to include, in each case, the transportation rate paid to the foreign port of exportation. To that was added the regular transportation charges from the foreign port to that point selected as the chief competing center in the United States.

In the onion investigation, transportation costs were figured by two methods: by production and by unloads at New York. Under either method the maximum duty increase was warranted.³¹ In the egg investigation, both foreign and domestic transportation costs were weighted by shipments and by production, but the maximum duty increase was warranted in either case.³² Likewise, in the window glass case, those costs were weighted by actual shipments, and by production of the United States east of the Mississippi River, and the maximum duty was warranted in either case.³³

The linseed oil investigation throws further light on the methods used. Foreign transportation costs were weighted by actual shipments. If domestic rates had been weighted by actual shipments, the full increase in duty would not have been warranted, but if weighted by production figures, it would have been. The maximum increase was proclaimed by the President indicating his preference for weighting by production.³⁴

From the above examples, certain conclusions can be drawn as to the manner in which the commission handled the problem of transportation costs, after once the Attorney General had ruled they should be included in cost comparisons.

In those investigations in which the maximum duty increase was warranted whether or however transportation costs were figured, the method of handling became immaterial. In those in which foreign invoice prices were used as evidence of costs of

²⁹ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 37.

³⁰ U. S. Tariff Commission, *Rag Rugs*, *op. cit.*, pp. 18 and 23.

³¹ U. S. Tariff Commission, *Onions*, *op. cit.*, pp. 58-60.

³² U. S. Tariff Commission, *Eggs and Egg Products*, *op. cit.*, p. 32.

³³ U. S. Tariff Commission, *Window Glass*, *op. cit.*, p. 40.

³⁴ U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, p. 46.

production, those were held to include foreign inland transportation costs, and to those were added the regular rates from the foreign port to the point in the United States selected as the chief competing center.

In the investigations in which there was only one foreign and/or one domestic producer, the problem of weighting was not a consideration.

In all the other investigations, if foreign transportation costs were weighted by production, all of which could not be assumed to come to the United States, such weighting was only used in those cases where the maximum increase in duty was warranted otherwise. In all other cases, foreign costs were weighted by the amounts actually shipped. For domestic costs, the more usual method was to weight the costs by production, since it was logical to assume that all the domestic product would either be directly or indirectly affected by the imported product. An exception to that was noticed in the case of cast polished plate glass where costs were weighted by the amount shipped. Linseed oil transportation costs were weighted by production apparently because it was found that weighting by actual shipments would not warrant the maximum increase in duty. Generally, therefore, foreign transportation costs were weighted by the amounts actually shipped, while domestic costs were weighted by the amounts produced. That the commission itself was in doubt as to the method they should use in weighting those costs was evidenced by a statement in its Thirteenth Annual Report to the effect that Congress might do well to clarify the point for its benefit in future investigations.³⁵

(5) *Principal Market or Markets*

The selection of the principal market or markets to which transportation costs were to be figured, is so closely allied to the foregoing discussion that a separation of them is almost unwarranted. However, above, the method of weighting those costs was examined. Now consideration will be given the problem of determining to what particular points in the United States those weighted costs should apply.

³⁵ *Thirteenth Annual Report of the U. S. Tariff Commission, 1929*, p. 23.

In the wheat investigation, it was easily determined that Buffalo was the principal competing center in the United States for domestic and Canadian wheat. In the year 1922-1923, it received one hundred million bushels of Canadian wheat in bond and for export, as well as the bulk of the imports and a considerable portion of the domestic hard spring wheat, while Minneapolis, receiving seventy-five per cent of the domestic hard spring wheat, was found to have been relatively free from Canadian competition because of the much higher transportation rates there than to Buffalo over the Lakes route. It was further found that the rates, ex-lakes to Buffalo, were substantially the same in both countries.³⁶

The next six investigations presented no problem concerning transportation costs, as the maximum duty increase was warranted in all, even by comparing only the differences between domestic and foreign factory costs.

Following those came the Attorney General's ruling, and so the determination of the competitive point or points to which those rates should be taken had to be definitely decided upon. Three alternatives were open for consideration. The rates could be taken for both the domestic and imported products to such point as the imported product entered the United States. They could be taken for the imports to the point of primary domestic production. Or the rate for the foreign product could be taken to the place of entry and the rate for the domestic product, to the principal market which would be found other than the port of entry or the chief market for the imports. The words of the section that costs should be equalized in the chief "market or markets" of the United States, seemed to indicate that provision was made for cases where the chief market for the imports was not the same as the chief market for the domestic product.

In many of the investigations, as was so often the case in other connections, it was found that the maximum duty increase was warranted without any decision being necessary as to the point to which either domestic or foreign transportation costs were figured. However, in the peanut investigation, transportation

³⁶ U. S. Tariff Commission, *Wheat, op. cit.*, pp. 10-12 and 14-15.

costs were figured for unshelled peanuts in three ways: for both imports and the domestic product to San Francisco, for both delivered to New York, and for the imports to San Francisco and the domestic product to New York. For shelled peanuts, such costs were figured in the same three ways except Chicago was substituted for New York. For both types, the President proclaimed the maximum increase in duty. That was not warranted for unshelled peanuts if transportation costs had been taken for both to New York, nor would it have been warranted if both had been taken to Chicago for the shelled peanuts. More than the maximum increase in duty would have been warranted, had transportation costs for both unshelled and shelled peanuts been taken to San Francisco. In the case of unshelled peanuts, the cost difference of 4.248 cents per pound was noted if transportation costs were taken for the imports to San Francisco and the domestic product to New York. The maximum increase proclaimed by the President was 4.25 cents per pound. Since the last noted cost difference was so close to being the maximum increase possible, it is not safe to assume that the President disregarded it entirely when making his duty change, and that he based that change on the cost differences including transportation costs for both the domestic and the foreign product to a common market in San Francisco, which would have more than warranted the maximum increase.

For shelled peanuts, the cost difference found, if transportation rates were taken for the imported product to San Francisco, and for the domestic product to Chicago, was 5.978 cents per pound, and the maximum duty increase proclaimed by the President was six cents.³⁷ This can hardly be cited as an investigation wherein transportation costs for both shelled and unshelled peanuts were taken for both the foreign and the domestic product to San Francisco, even though the maximum increase proclaimed would have been warranted by so doing, since, in both cases, the maximum increase was so nearly warranted if domestic costs had been taken to Chicago and New York, respectively, and Chinese costs, to San Francisco.

In the following twelve investigations, New York was desig-

³⁷ U. S. Tariff Commission, *Peanuts, op. cit.*, pp. 51, 66, and 88.

nated the chief competing center for the domestic and foreign products.

In the butter and cheese investigations, no specific mention was made in the commission's report as to why they selected New York, but for both cresylic acid and phenol, the commission reported that approximately ninety per cent of the products sold in the United States was marketed along the Atlantic seaboard. Thus, New York was judged by them to be the chief competing center.³⁸

New York was taken as the chief competing center for rag rugs, since it was found that it was the principal distributing point for both imported and domestic rugs.³⁹ In the onion investigation, the commission reported that "more onions are marketed in New York than in any other city in the United States." As for the Spanish imports, it said that "New York was the leading port of entry, receipts there representing eighty-one per cent of the total in 1925, and eighty-seven per cent in 1926."⁴⁰

New York was likewise found to be the principal market, and the chief consuming center for domestic and foreign frozen eggs.⁴¹ In the linseed oil investigation, no single consuming center was found. Except for the two years 1925 and 1926, New York had led in the import trade, but the product was consumed in New York, Chicago, Philadelphia, Lancaster, Cleveland, Detroit, Trenton, and St. Louis. However, since it was found that forty per cent was consumed in the area from Boston to Baltimore and inland to Lancaster, New York was taken as the geographic center of the area, and thus considered the principal market for the domestic and imported oil.⁴²

For window glass, New York was found to be the port at which the greatest amount entered the country, thirty-nine per cent of the 1926 imports entering there. But of the sixteen principal markets studied by the 'commission, more of the domestic glass was consumed in Chicago than in New York.

³⁸ U. S. Tariff Commission, *Cresylic Acid*, *op. cit.*, p. 10 and *Phenol*, *op. cit.*, p. 6.

³⁹ U. S. Tariff Commission, *Rag Rugs*, *op. cit.*, p. 17.

⁴⁰ U. S. Tariff Commission, *Onions*, *op. cit.*, pp. 54-55.

⁴¹ U. S. Tariff Commission, *Eggs and Egg Products*, *op. cit.*, p. 28.

⁴² U. S. Tariff Commission, *Linseed Oil*, *op. cit.*, pp. 40-41.

Nevertheless, New York was taken as the chief competing center, presumably because of the found condition that most of the Belgian glass was marketed not far distant from the places of customs entry, and New York was the chief point of such entry.⁴³

In the flaxseed investigation, New York was considered the chief domestic market because, during 1925 and 1926, about ninety-one per cent of the total imported product was crushed in New York, as was thirty-eight per cent of the domestic product.⁴⁴ New York was likewise found to be the chief market for both imported and domestic magnesite.⁴⁵ In the case of pig-iron, New York was apparently chosen because sixty-five to ninety per cent of the imports, over a three year period, was entered in Atlantic ports north of Virginia and was consumed in adjacent territory.⁴⁶

In the paint brush handles investigation, Newark was chosen the chief competing center, and transportation rates for the three domestic and one Canadian producer were taken to that point.⁴⁷

Transportation costs were figured only for the imported product to New York in the straw hat and print rollers investigations, since domestic production and consumption were both centered in that city.⁴⁸

In the plate glass investigation, a different situation prevailed. It was pointed out by the commission that the imported glass entered the United States at numerous points, and that the consuming centers were still other points scattered over the country. When the final cost tables were made up, transportation costs were calculated on two different bases. By one, such costs were taken and averaged for both the imported and domestic product to fourteen principal consuming centers, and by the other, those costs were taken to the single city of Cleve-

⁴³ U. S. Tariff Commission, *Window Glass*, *op. cit.*, pp. 30-39.

⁴⁴ U. S. Tariff Commission, *Flaxseed*, *op. cit.*, p. 37.

⁴⁵ U. S. Tariff Commission, *Magnesite*, *op. cit.*, pp. 18-19.

⁴⁶ U. S. Tariff Commission, *Iron in Pigs*, *op. cit.*, p. 26.

⁴⁷ U. S. Tariff Commission, *Paint Brush Handles*, *op. cit.*, pp. 12-14 and 18.

⁴⁸ U. S. Tariff Commission, *Men's Sewed Straw Hats*, *op. cit.*, p. 10, and *Print Rollers*, *op. cit.*, pp. 37-39.

land.⁴⁹ The commission was divided on the point, Commissioners Marvin, Brossard, and Lowell wanting the transportation costs weighted and averaged for both foreign and domestic glass to the fourteen enumerated points. They pointed out that during the three year period of the investigation, approximately ninety-seven per cent of all the imports had entered through those ports, and approximately, fifty-six per cent of the total sales of domestic glass was made there.⁵⁰

Commissioners Dennis, Dixon, and Clark urged that costs be taken only to Cleveland. They held that in all previous investigations, one single city had been selected as the point to which such costs were figured, and that in selecting Cleveland, they would be selecting not only an important glass market, but, as well, the mathematical center of plate glass consumption in the United States.⁵¹ The President, however, decided in favor of the first three commissioners.

In the milk investigation, transportation costs were figured in two different ways, based upon the facts found that approximately sixty per cent of the Canadian milk was separated or otherwise manufactured at border plants, and that another thirty-seven per cent, after being pasteurized at those plants, was sent to New York. Also, it was found that most of the milk produced in the three milk sheds of Boston, New York, and Philadelphia was sent to those respective cities. However, it was found that little of the imported milk was sent to Boston and none to Philadelphia. The first method used was to adopt the border plants as the centers of competition, and since most of the transportation expense connected with getting the milk from the farms to those plants was in the nature of a haulage charge, and was thus included in the farm costs, no additional transportation charge was considered necessary. The second method was to adopt some common competitive center, and calculate transportation costs to it. If such were done, New York was considered the logical city, since thirty-seven per cent of the imported milk, as noted above, moved to New York, which

⁴⁹ U. S. Tariff Commission, *Cast Polished Plate Glass*, *op. cit.*, pp. 20-25.

⁵⁰ *Ibid.*, p. 32.

⁵¹ *Ibid.*, pp. 34-35 and 38-43.

was also, the chief consuming center of the domestic product. However, in using that method, it was found that many of the milk producing areas covered in the investigation did not actually ship milk to New York, and therefore, no transportation rates were published. Costs could only be taken for the shipments actually made.⁵²

Commissioners Marvin, Dennis, Brossard, Lowell, and Clark favored the first method, feeling that the bulk of imported milk met in competition with domestic milk at the domestic border plants.⁵³ Commissioner Dixon urged the selection of New York, citing its unrivalled importance as a consuming center, and its reliance upon Canadian milk when the domestic supply was insufficient to satisfy its demand.⁵⁴ The President, however, accepted the findings of the majority of the commission.

In summary, certain well defined practices of the commission stand out in the determination of the chief competing center in the United States, to which transportation costs were invariably taken after the Attorney General ruled to that effect.

First, only actual transportation costs were taken. In no case were hypothetical costs taken in order to have the domestic and the imported product meet in a common competitive market if they did not actually do so.

Second, in a preponderance of the investigations, New York was taken as the chief competing center, but that was only done after the commission was satisfied that the port of entry for the imported product was also the point where the domestic and foreign products met in the most appreciable competition. Two corollaries are noted in that connection: first, that transportation costs were taken for both the domestic and foreign product to New York when it was found to be the chief common competitive center, and when the domestic product was not produced in or near that city; second, when the domestic product was found produced chiefly in or near New York, which was also found to be the chief competing market, transportation costs were only taken, logically, for the imported product. In the other

⁵² U. S. Tariff Commission, *Milk and Cream*, *op. cit.*, pp. 26-27.

⁵³ *Ibid.*, pp. 28-29.

⁵⁴ *Ibid.*, p. 30.

investigations, transportation costs were figured for both the imported and the domestic product to points other than the port of entry of the foreign product, when such other points were found to be the chief competing centers.

Third, the commission did not always select a single city as the chief competitive point when it was found more than one such point existed.

Fourth, although without definite proof from any investigation, there is some basis for the assumption that foreign costs might have been taken to their chief domestic market, and domestic costs, to their chief market, the two markets not being the same.

In other words, transportation costs were figured to a common market for both products if such existed, and that common market, in practice, was not always restricted to a single city. That latter practice seemed to have superseded the earlier practice of the commission to take, as it did in the linseed oil investigation, the point which was judged to be the geographical center of consumption, in the absence of a single common market. Notably little disagreement was evident in the commission over the policy followed in choosing the chief competing center, although in many cases, the maximum duty increase was warranted whichever way it was handled.

VIII

THE FLEXIBLE SECTION IN THE 1930 ACT

In June of 1930, a new section was enacted by Congress to replace section 315 of the 1922 act, and so, to provide the United States with a continuation and an improvement of the flexible tariff arrangement. The fact that such a section was included in the new act, indicated that Congress, generally, not only approved of the idea, but, as well, approved of the manner in which the Tariff Commission had administered the earlier section.

In the tariff bill as it came from the House Committee on Ways and Means, the flexible section, numbered 336, contained several changes as compared with section 315. The procedure was much the same, but the President, instead of proclaiming duty changes to equalize differences in costs of production, was directed to equalize differences in conditions of competition. That, it will be remembered, was the yardstick of equalization which the House recommended in 1922, and which, subsequently, was discarded by the Senate in favor of "costs of production."

Furthermore, such differences in conditions of competition were to be equalized in "the principal market of the United States." That was a change from the provision in section 315, which stated that equalization was to be effected in the "principal market or markets of the United States."

Consideration has already been given above to the changes which took place in subdivision (b), in which provision was made for a change to the American selling price, in the event the found cost difference could not be equalized by increasing the existing duty by the maximum allowed under subdivision (a), that is, by 50 per cent.¹

Several changes were made with respect to those things which the President was directed to take into consideration in ascertaining the differences in conditions of competition, insofar as he would find it practicable to do so. He was directed to

¹ *Supra.*, Chap. II, pp. 36-42.

consider the costs of production of the domestic article, or the price at which such article was freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade, and in the usual wholesale quantities. He was directed to consider foreign costs of production of the imported article, or the price or value set forth in its invoice. Furthermore, he was to consider the cost of all containers and coverings of the article being investigated, as well as other charges and expenses incident to placing the article in condition packed ready for delivery, plus transportation costs. Finally, the President was to consider all other advantages granted to a foreign producer by a government, person, partnership, corporation, or association in a foreign country.

In that part of the section devoted to definitions, several additions were made. Apparently in answer to such problems as the one raised in the gold leaf investigation, when the domestic article was not physically identical to the imported article, but when the two were functionally the same, the bill provided that an article was to be considered like or similar to a domestic article if the imported one was of the same class or kind as the domestic one, and if it accomplished results substantially equal to those accomplished by the domestic article, when used in substantially the same manner and for substantially the same purpose.

The determination of the principal competing country was elaborated upon. The President was directed to take into consideration the quantity, value, and quality of the article imported from each competing country, as well as any other differences in the conditions under which the article was imported from each competing country. Furthermore, the determination of the principal competing country by the President was to be final. The term "United States" was defined to mean the several states, the territories, and the District of Columbia.

Finally, the term "costs of production" was held to include, for both the domestic and the imported article, the price or cost of materials, labor costs and other direct charges incurred in the production of the article, and in the processes or methods used in its production; the usual general expenses, including

charges for depreciation or depletion which were representative of the equipment, and property employed in the production of the article, and charges for rent or interest which would be representative of the cost of obtaining capital or instruments of production, the costs of containers and coverings, and the expenses incurred in placing the goods in a condition packed ready for delivery; and such other factors as the President might deem applicable. Essentially, the remainder of the new section was the same as section 315.²

In the Ways and Means Committee report which accompanied the newly drafted tariff bill, that part dealing with section 336 noted that in 1922, Congress was aware of its obvious inability to ascertain with exactness all the essential facts relating to the myriad items in a tariff act, and to fix effective protective duties to meet constantly changing competitive conditions, and so, it had passed section 315 under which the President, after investigations by the Tariff Commission, was given power to adjust and readjust rates fixed in the statute, subject to the limitations prescribed, so as to equalize domestic and foreign costs of production. It then pointed out that certain difficulties experienced in the administration of that section needed attention, and changes were necessary in order to give full force and effect to the policy indicated in the flexible tariff arrangement.

The first of the suggested changes, the report continued, was that the thing to be equalized should be foreign and domestic competition in the markets of the United States, rather than costs of production, since those were, in many instances, unobtainable by the commission for the imported product. Also, costs of production were found not to accurately reflect competitive conditions, but that equalization of conditions of competition would be effective in doing that.

Continuing, the report stated that as costs of production might not always be obtainable, especially for the imported article it might be advisable in some cases to use the landed or import cost as the starting point, adding thereto the costs incident to placing the article in a position comparable to that of the com-

² *H. Doc. No. 15, 71st Cong. 1st Sess.*, pp. 159-164.

peting domestic article. With respect to transportation costs, the committee did not feel that a rigid policy should be laid down by Congress, but that the commission should be left to decide just how they should be handled as the cases were presented, and the facts developed. As to export taxes, they were much the same in nature as transportation costs, and their inclusion or exclusion should be at the discretion of the commission.

Finally, in connection with the selection of the chief competing country, the report stated that the President was to consider the quality, quantity, and value of the imports, in order to determine such country. In each case, it was their intention to have that country selected as the chief competing country whose exports offered the greatest competition with the similar competitive article in the United States.³

The section was essentially unchanged by the House. The Senate Finance Committee amended the transportation feature to provide that such costs should be taken for both the foreign and the domestic article to the port of importation of the foreign article. When the Senate Bill reached the floor of the Senate, numerous changes were made in it. On September 19, it was reported that the Finance Committee had agreed to return to the old standard of "differences in costs of production", in the hope of melting some of the opposition that was developing over the flexible provision.

The debate in the Senate on the flexible provision was extended and marked by new political alignments which at times, indicated the failure of any party or bloc to pass a bill in any form. With particular respect to the flexible provision, the question was not an issue of how it should be worded, but rather, whether there should be a flexible provision at all. The opposition pointed to the number of times the provision had been exercised for a downward revision of rates, as against the number of times it had worked for an increase in rates, and they pointed to the length of time which it took for a rate change to be made under section 315. President Hoover, himself, spoke on the matter, and urged the retention of the flexible tariff feature.

³ *H. Doc. No. 15, 71st Cong., 1st Sess., pp. 335-338.*

When the flexible provision came to a vote in the Senate, on October 2, 1929, the Administration suffered defeat and the Democratic proposal was approved by a close vote of 47 to 42. That proposal made the important change in the flexible provision, that the commission was to send its reports to Congress for action rather than to the President. However, it was firmly believed that the flexible feature would be restored in the Conference Committee or if not, that the bill would likely die in that committee. In either event, the President would be saved the necessity of vetoing the bill because of its failure to include the kind of flexible provision he so strongly desired.

The Conference Committee fell in line with the above prediction, and returned to the President his power in connection with tariff changes under the section. However, in the first Conference Committee amendment, the provision was made to read that the President "shall" act upon the reports of the commission within a set limit of sixty days. That meant that the commission was no longer to be merely a fact-finding body, but that it was to be regarded as a branch of Congress, whose recommendations should receive either the assent or the veto of the President, such as would be his action upon any matter placed before him by Congress, itself.

The bill, however, was sent back to the Conference Committee after a point of order concerning the flexible provision had been sustained, and the second Conference report on the provision provided for a section much more similar to 315 than any of the others had been. The chief change was that the President was not to be required to act upon the commission's recommendations within sixty days; he could either accept them or reject them whenever he saw fit, or he need not act upon them at all. The section as it appears in the act finally signed by the President on June 17, 1930, was substantially unchanged after the second revision made by the Conference Committee.

The full text of section 336 follows:

SECTION 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) Change of Classification of Duties.—In order to regulate the foreign commerce of the United States and to put into force and effect the policy of

Congress by this act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the difference in the costs of production of any domestic article and of any like or similar foreign article produced in the principal competing country or countries. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall recommend in its report such increases or decreases in rates of duty expressly fixed by statute including any necessary change in classification as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) *Change to American Selling Price.*—If the Commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g) of the domestic article), as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) *Proclamation by the President.*—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) *Effective Date of Rates and Changes.*—Commencing 30 days after the date of any Presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) *Ascertainment of Differences in Costs of Production.*—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable: (1) in the case of a

domestic article,—(A) the cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition. (2) in the case of foreign article,—(A) the cost of production as hereinafter in this section defined or if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof or as supplemental thereto, the weighted average of the invoice prices or values of the foreign article for a representative period, and/or the average wholesale selling price for a representative period, which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by government, person, partnership, corporation, or association, or a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list nor a change in form of duty.

Whenever it is provided in any paragraph of Title I of this act, or in any amendatory act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.⁴

A comparative study of sections 315 and 336 shows that the two are similar in many respects. However, the differences are important in that they solve, to some extent, the difficulties experienced by the commission in the administration of section

⁴ *The Statutes at Large of the U. S. of America, op. cit.*, Vol. XLVI, Pt. 1, pp. 701-703.

315. The two that stand out most prominently have to do with transportation costs, and the determination of foreign costs of production.

With respect to the first difference, the new section specifically directs the commission to include such transportation costs for both the foreign and the domestic article to the principal domestic market or markets. There is no mention made, however, that this must be the same market for both. Furthermore, there seems to be nothing to prevent the commission from choosing more than one market as the point of chief importance for either or both the foreign and the domestic article. Also, Congress did not state how or if such rates should be weighted.

The second difference between the two sections has to do with the determination of foreign costs of production. In the new section, three different methods of securing such foreign costs or evidence of such costs are provided. First, actual foreign costs of production are to be collected, if obtainable by the commission, for comparison with domestic costs. If these are unobtainable or if the commission wishes to supplement them, a second method provides that a weighted average of the invoice prices or values of the foreign article for a representative period may be taken as evidence of such costs. Finally, the average wholesale selling price for a representative period may be taken, which price is to be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country, or countries in the ordinary course of trade, and in the usual wholesale quantities in such market or markets. The last method provides an escape in case costs of production are not obtainable, and in case, also, that there might have been no importations during the cost taking period, or no representative importations.

Three other differences are noted. The first of these appears in the opening sentence of the section wherein the persons or bodies which have the authority to ask for investigations under the section, are enumerated. Such was not given in the 1922 section, although the rules and regulations set up by the commission provided for substantially the same arrangement. Second, the new section provides that costs shall be equalized

between the domestic article, and that produced in the "chief competing country or countries."

The final change is with respect to the enlarged power of the Tariff Commission. In section 336, the commission is authorized by Congress, after having made the necessary investigation, to "recommend" to the President the change in duty necessary to equalize the found difference in costs of production. In section 315, the commission was not given the power to recommend the rates to be proclaimed; it was simply a fact-finding body and it could only indicate what rate change seemed necessary to equalize the found cost difference, and suggest that such a rate change be made by the President. Furthermore, under section 315, the President was not bound to either accept or reject the rate the commission suggested. In some cases, he chose to proclaim a rate other than the one found by the commission, so long as he stayed within the 50 per cent limit. Under the new section, the President is bound to either accept or reject the rate recommended by the commission, much as he would accept or veto any act of Congress placed before him. The Tariff Commission, in other words, becomes a branch of Congress, and the President is to deal with its reports as though they came directly from Congress.

IX

CONCLUSIONS

Prior to and subsequent to the passage of the Tariff Act of 1922, establishing a flexible tariff arrangement for the United States, section 315 was hailed as the means whereby the tariff would not only be taken out of politics, but would be made scientific, as well.

The study made of the operation of the flexible tariff from 1922 to 1930, furnishes a basis for an evaluation of the concept, as demonstrated by the provisions of and the administration of section 315. Such an evaluation can proceed in an effort to answer two questions. Did section 315 succeed in removing the tariff from politics? Did it succeed in making the tariff scientific?

The Tariff and Politics

At the outset, a consideration of the question of whether or not section 315, in its provisions and the interpretations thereof, took the tariff out of politics, must be preceded by an evaluation of flexibility, *per se*. In other words, was it desirable to make some arrangement for tariff changes, either up or down, as the need therefor arose, or should none be made except during a general tariff revision when, because of a relatively long accumulation of needed changes, a realignment of all tariff rates became necessary and unavoidable? This is the issue of flexibility versus inflexibility. With particular reference to the United States in 1922, the question was whether Congress alone should deal with tariff changes at relatively infrequent intervals when business and other considerations should force a general revision, or whether Congress should delegate its power, under specified limitations, to the United States Tariff Commission.

Theoretically and practically, such a delegation of power seemed highly desirable if the tariff were to be taken out of politics. There was, however, considerable debate in Congress over that issue, but as noted above, the power was finally given to the commission under the limitations set down in section 315.

It was taken almost for granted that the constitutionality of so doing would be questioned, but the Hampton case settled that issue in favor of the flexible section.

Flexibility, *per se*, was decided upon and, on the surface, seemed theoretically and practically preferable to the old arrangement of inflexibility. Rates, presumably, were to be changed as the need became apparent or real. No longer were needed changes to accumulate over a period of years, and eventually force a general tariff revision, during the course of which business would become adversely affected because of its inability to determine what changes would be made, or when they would be made. The so-called upheaval of business, following upon the establishment of an entirely new schedule of rates, resulting from a general revision, would be obviated. Furthermore, the rate changes were to be made by the commission, supposedly a body of experts, which could more perfectly determine the needed changes than would be true in the case of Congress, where many of the members would be unfamiliar with at least a portion of the legion of commodities being considered in that connection. Theoretically, it was a defensible move, since the rate changes would be made by experts; practically, it was defensible since the changes would be made as the need therefor arose, instead of *en masse* during a general revision.

Considering only that part of the question, of whether flexibility, for itself, was desirable or not, theory and practice weighed-in largely in favor of it. However, two closely related problems immediately demand consideration and evaluation.

In the first place, the composition of the commission became of paramount importance. According to section 700 of the Revenue Act of 1916, which established the Tariff Commission, it was provided that the commission should be composed of six members, not more than three of whom could be from the same political party. The administration of the flexible section was, therefore, to be given over to a commission that was political in make-up, in the full sense of the word.

In the second place, the agency to which the commission should report the results of its investigations, and its suggestions for tariff changes, became of equal importance. That agency was

to be the Chief Executive. Therefore, even though the commission were composed of three high protection Republicans, and three low protection Democrats, the balance of power would be in the hands of the executive who would, presumably be ruled by his party beliefs. Theoretically, therefore, the arrangement provided for in section 315 could not be held, in any way, as making for the removal of the tariff from politics. Practically, the same conclusion can be reached on the basis of a study of rate changes made under the section. Attention can be here called to several instances in proof, among those given above.

To anticipate a later point and its discussion, it will be remembered that the commission was given practically a free reign in deciding how the final cost of production figures should be derived. The section specifically mentioned several cost elements that were to be included, but the full reign was given in the subdivision that allowed the commission to consider "any other advantages or disadvantages in competition." Under that grant of power, especially, it was possible for the commission to find, in almost any case, a cost difference that would warrant the maximum increase in duty permissible under the section. In the flaxseed investigation, the Argentinian export tax was excluded, and a higher duty increase was warranted by so doing. In the cream investigation, comparability of costs was questioned by Commissioner Dixon, but his objections were overruled, and, consequently, a higher cost difference was found. The unusual practice of converting the foreign power costs at the par of exchange, and all the other costs at the current rate of exchange, was followed in the sodium nitrite investigation, by which procedure a higher duty increase was warranted than would have otherwise been the case. In the linseed oil investigation, transportation costs for the domestic product were weighted by production rather than by shipments, apparently, in order to find a greater cost difference. In the men's sewed straw hat investigation, the commission suggested that the duty on hats having a value of \$9.50 or more per dozen, should be decreased by five per cent. The President, in his proclamation, stated that he saw nothing to warrant such a decrease, and so declared the duty unchanged. This latter case demonstrated the fact that

even when the commission suggested a certain rate change, the President might proclaim any other change so long as he kept within the limitations stated in the section.

It might be held that in the above cases some real justification existed for the actions taken, which in each case led to a higher duty. But some doubt naturally arises when the commission failed to follow its regular practice in some part of the cost investigation. The doubt is strengthened in view of the fact that of the thirty-eight reports acted upon by the President, duty increases were proclaimed in all but five cases: phenol, cresylic acid, paint brush handles, live bobwhite quail, and wheat feeds.

Finally, mention should be made of the fact that in the early investigations and reports by the commission, considerable difference of opinion arose therein. Gradually, that dissension grew less and less. Rumors are to the effect that the accomplishment of substantial agreement within the commission came about because certain members "resigned", and were succeeded by men of the opposite party, who held views more in accord with those of the ruling party.¹

Therefore, it can be said that the delegation of the power over tariff changes by Congress to the Tariff Commission, was both theoretically and practically desirable, since it meant that rate changes would be made at such times as they were needed, and by a body of experts. To that extent, the tariff was taken out of politics. However, with the commission being a definitely bi-partisan body, and with it reporting its findings to the President, the balance of power was in his hands. Harmony was to be promoted within the commission by appointing Democrats who were not too strongly free traders in their convictions or Republicans who were not high-protectionists, depending on which party was in power. That was logical, since the opposition, in any event, would have so little chance of gaining a point, with the balance of power held by the President. The final conclusion is, that because of the political make-up of the commission, and because the balance of power was held by the President, who

¹ Wright, Philip G., *Tariff-Making by Commission*, (The Raleigh Tariff Bureau, Washington, 1930), pp. 16-28.

could proclaim the rate suggested by the commission or any other rate he saw fit, so long as he kept within the specified limitations of the statute, the flexible section 315 practically speaking, did not and could not remove tariff making from politics.

A Scientific Tariff

The other question to be answered on the basis of section 315 and its administration, is whether or not scientific tariff making was provided thereby.

Congress laid down, in 1922, what might be called a yardstick for the measurement of duties. Duties were to equalize foreign and domestic costs of production. As noted above, the commission was directed to consider certain cost elements in each case, but a more or less blanket authority was conferred on it in subdivision (c) part (4), which allowed the taking of any other advantages or disadvantages in competition, in order to determine the final cost figures.

The first implication made in the term "costs of production", is that the costs taken should be costs in the real sense of the word. That is, such costs should not include any element of profit. It is not to be assumed that the producers would willfully falsify their cost records, but the possibility of their doing so was not to be disregarded.

It may be said that the commission, apparently, proceeded in a scientific manner in this connection insofar as was practically possible. For example, interest on invested capital, as noted above, was regularly figured on the depreciated book value of the assets. However, in some of the agricultural investigations, there was disagreement within the commission with respect to the imputing of wages to farmers' wives and families. Also, there was question as to the proper deductions to be made for the value of a farm as a home. In the matter of determining the costs of roughages, and other products that could scarcely be held to have a marketable value, the commission was divided. These are evidences of the fact that the commission can be criticised in not having determined, theoretically, perfect costs, in spite of the fact that it would have been, prac-

tically, a physical impossibility to have done so in every case.

Granting that such costs were actual costs, the next point of theoretical criticism has to do with the strict meaning of the term "costs of production". In an economic sense, production means the creation of time, form, place, and ownership utilities. The cost of accomplishing these various utilities, all of which must be created before production is fully completed in an economic sense, would be the cost of production for an article. Exactly what costs were taken by the commission in determining the cost of creating form utility, can not be fully learned from its reports in all investigations, because of the restriction against the publication of confidential information. However, in those cases where actual or percentage cost figures were published, it appears that the commission was scientifically proceeding in the derivation of costs of producing form utility, although a positive statement on that point could only be made by experts entirely familiar with the production methods of each of the commodities investigated.

Even assuming the costs collected were actual and real costs, and that the costs of producing form utility were comprehensive in each case, there remain the costs of creating place, time, and ownership utilities. As to the costs of creating place utility, transportation costs were included after the ruling of the Attorney General. However, no invariable practice was followed in that connection, although that can be explained, at least in part, by the fact that the commission had no specific instructions to follow. However done, the inclusion of transportation costs, brought the administration of the section more in accord with theory than had previously been the case. As to time utility, aside from that provided for by transportation, the commission did consider elevator and storage charges. With respect to the fourth kind of utility, the commission specifically refused to consider its costs. As was noted above, it regularly segregated and excluded all costs of marketing, thus vitiating any claim it might have otherwise made, that its understanding of the term, costs of production, was in accord with accepted economic theory.

Thus, the theoretical implication that the costs collected

were costs in the real sense of the word, can not be practically substantiated from the evidence at hand. Theoretically, it would have been possible for the commission to have examined fully, each cost figure taken, in order to determine that such costs were actual, and did not contain any element of profit whatsoever. With due respect to the commission's apparent effort to do that, the practical impossibility of doing so in every single instance, consequently throws the administration of the section, in this respect, into questionable ground. In the second place, costs of production to be theoretically perfectly determined, would have necessitated the collection of the costs of creating time, form, place, and ownership utilities. Even assuming that the commission performed satisfactorily in gathering the costs of creating the first three of these utilities, the fact that it did not, definitely, include costs of creating ownership utility, again throws the administration of the section into discord with theory.

The next point of theoretical attack has to do with another phase of the term, "costs of production". Granting that the commission had taken only actual costs in each case, and that those costs would have included the costs of creating all four forms of utility, the question next arises as to whose costs were to be the ones taken.

Actually, costs of production vary within relatively wide limits. Some producers are efficient, others are inefficient. Equilibrium, or normal, price is set as a result of the interaction of demand and supply and is the price that tends to prevail in the long run after competitive forces have had a chance to operate completely. Market price, on the other hand, is the price that tends to prevail temporarily and it reflects the currently imperfect adjustment of demand and supply. However, market price tends to be drawn to normal price. Therefore, at a given price, supply equates with demand, but all of the supply will not have been produced, ordinarily, at a cost equivalent to the market price. All but the marginal units of the product will have been produced at a cost less than the market price, assuming increasing costs of production, that is, that costs increase as production increases. Industries with increasing costs are the ones most directly concerned in tariff matters as those with

decreasing costs can improve their competitive position by the simple expedient of increasing production with a resultant decrease of costs of production and subsequently, of price.

The last unit of supply necessary to bring supply and demand into equation, at a given price, will be the only unit that will have a cost approximately equivalent to the market price. That last or marginal unit will provide no profit to the producer; he will only recover his costs of production. All the producers above the marginal producer will receive an amount additional to their costs, varying directly with the distance they are above the marginal producer, and which amount will be in the nature of a reward for some superiority, on their part, in the process of production.

Therefore, the question arose, if the commission is to equalize costs of production, whose costs are to be taken? If the costs of the marginal, or least efficient, producer were taken, it would have meant that the tariff rate would have more than equalized the costs of all the other producers above the margin. That would have been full protection, eventuating in the complete elimination of importations. If the costs of the most efficient producer were taken, the resultant degree of protection would have been practically nil, since only the most efficient producer would have benefitted fully by the tariff rate. Presumably, neither of those extremes was contemplated by Congress, yet there was nothing in the section to prohibit the commission from taking either of such producer's costs for the purposes of the section.

The commission, as was seen above, pursued the middle course, and took average weighted costs. But that was no solution; that did not make for a theoretically scientific tariff. The main reason why average costs can not be defended theoretically for tariff purposes, is because, in so doing, the incentive to improved efficiency is removed.² For example, if a given producer improved his productive processes, and thus lowered his costs, that would effect a lowering of the average cost figure, and presumably, a duty reduction would follow which would

² Patterson, S. Howard and Scholz, Karl W. H., *Economic Problems of Modern Life*, (McGraw-Hill Book Company, New York, 1931), pp. 237-238.

offset, at least in part, his gain from improved efficiency. Similarly, if his costs were increased through inefficiency, it would be of less concern to him than otherwise would be the case, since that would raise the average cost figure, and thus the duty would be increased. In either case, the premium on inefficiency is to be noted, and the finding placed in the balance against the theoretical justification of the section in that respect.

Continuing upon the attack against the "equalization of costs of production standard," but from a different angle, Thomas Walker Page can be quoted as saying that "the application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to."³ Demonstration of that statement is easily at hand from the study made of the operation of section 315. The difficulty of estimating costs for plants operating on part-time schedule was noted, as was the difficulty in estimating costs of production for by-products and joint products. The determination of the chief competing country, and the chief competing center in the United States complicated the efforts of the commission to arrive at final cost figures. The decision as to what years or months were to be taken as the basis for cost collections, and the determination of satisfactory comparability between the domestic and imported products, were additional factors which troubled the commission, and required it to exert its own discretion in the solution thereof.

A further complicating factor could be cited in connection with the determination of both foreign and domestic costs. In spite of all the American anti-trust laws, and because of the numerous foreign laws and practices favoring trusts and cartels, the question may be asked if there were not some degree of monopoly present in some or all of the costs that were taken. Such costs were apparently not within the meaning of section 315, which in one part specifically mentioned "all other advantages—in competition." The degree to which monopoly was present in either country, would have been the degree to which the flexible section, could have been manipulated to defeat its

³ Page, Thomas Walker, *Making the Tariff in the United States*, (McGraw-Hill Book Company, New York, 1924), p. 83.

own end. Industries that are monopolistic in character are ordinarily industries of increasing returns. In such industries, production could be temporarily curtailed, and production costs therefore increased, thus indicating the necessity for an increase in duty. After such increase was gained, production could be again increased, costs lowered and effective competition made impossible because of the high duty. If costs would be later investigated looking toward a decrease in duty, the same process might be repeated.

In another observation on this question, Mr. Page says "The difficulties in obtaining and verifying costs of production are infinitely greater in foreign countries than they are in the United States."⁴ Not only was there the element of national sentiment militating against the submission of costs to the agents of a foreign commission, but also there were the difficulties of understanding the foreign language and foreign business practices. The problem would have been complicated to infinity had Russia ever been found the chief competing foreign country in a section 315 investigation. No rent, such as that arising from the private ownership of land, is paid in Russia, capital is pooled, and their loans are not amortized according to any definite policy, with the result that practically any cost figure could have been furnished to the commission's agents.

Again, the problem of foreign exchange conversion presented potential and actual difficulty. Discretion had to be exercised by the commission in deciding how to convert foreign costs, whether to use the current rates prevailing during the cost taking period, or the par of exchange. Instances were noted above where conversion was made on the basis of the one that, apparently, provided the greater cost difference. The question also arises in this connection, as to whether or not the exchange rates reflect, at all times, the real condition as to price levels in the two countries. In other words, would a rate of \$8.80 to the pound mean that \$8.80 converted into pounds would have the same purchasing power in England in pounds as it had in the United States in dollars. If such were found to be the case, then the rate

⁴ Page, Thomas Walker, *Making the Tariff in the United States*, *op. cit.*, p. 95.

of exchange, and the so-called purchasing power of the two monies would be the same. But if the situation was not that, if the \$8.80 converted into pounds had a greater purchasing power in pounds in England than they had in dollars in the United States, an advantage would be gained in converting dollars into pounds, and spending them in England, so long as the discrepancy between the rate of exchange and the purchasing power of the two monies existed. The commission would have had to have determined this point in all of its exchange conversions, which obviously would have been, again, almost a physically impossible task.

In conclusion, therefore, both a practical and a theoretical evaluation of section 315 leads to very damaging criticism of the section, and one can not but agree with Mr. Page, among the other authorities, that "the conclusion can not be escaped that it is rarely possible to ascertain accurately the difference in costs of production at home and abroad."⁵

Costs of production to the economist mean the actual costs of the marginal producer. At least, that is the short-run condition, and while, in the long-run, value from the supply side tends to be set by the representative or ordinarily well-managed producer,⁶ that long-run condition can hardly be held appropriate for tariff use. Therefore, the wording and interpretation of section 315 does not provide for either a theoretical or a practical cost figure short of the costs of marginal producers, which would make the tariff protective to the point of being prohibitive. If that were not contemplated, and obviously it was not, then the questions loom legion as to the derivation of a theoretically and practically defensible cost of production figure. Producers might consciously or unconsciously include an element of profit in their cost figures. Also, a great amount of discretion was lodged in the commission as to what costs it would take and what ones it would not take, over and above those specified for inclu_

⁵ Page, Thomas Walker, *Making the Tariff in the United States*, *op. cit.*, p. 99. See also, Patterson, S. Howard and Scholz, Karl W. H., *Economic Problems of Modern Life*, *op. cit.*, pp. 237-238 and Wright, Philip G., *Tariff-Making by Commission*, *op. cit.*, pp. 31-37.

⁶ Bye, Raymond T., *Principles of Economics*, (Alfred A. Knopf, New York, 1929), p. 340.

sion by the section. Even so, the commission did not collect costs of production that would be in accord with the economic meaning of the term, since, at least, it did not include costs for creating ownership utility. Furthermore, taking average costs for the purposes of section 315 inevitably tended to place a premium on inefficiency, contrary to theory. The difficulties in deciding upon costs for plants on part-time bases of production, in deciding upon costs for joint and by-products, in deciding upon the chief competing country and the chief competing center in the United States, in deciding upon the period for which costs were to be taken, in determining the issue of comparability and the existence or non-existence of a degree of monopoly, in securing and checking foreign costs of production, and in deciding how foreign costs should be converted into dollars, all of these difficulties were continually before the commission in its administration of section 315.

All in all, such a great amount of discretion could have been exerted by the commission that almost any cost figure could have been derived by it. Granted that the commission was doing its best to interpret the section as it was written, it could hardly be expected to have been any more than reasonably successful in accomplishing something that was a theoretical impossibility, unless rates were found that would have been prohibitive. Criticism should not be altogether directed at the commission for failing to make the tariff scientific under section 315, when Congress failed to provide the essentials of a working arrangement to that end. In turn, Congress should not be too severely censured for failing to provide for scientific tariff-making, an ideal admittedly difficult to accomplish in a theoretically and practically satisfactory manner.

The answers, therefore, to the two questions postulated at the beginning of this chapter, are that section 315 in text and in interpretation, did not take the tariff out of politics, nor did it provide for scientific tariff-making by commission. Attention can now be turned to the flexible section appearing in the Act of 1930 to see whether or not Congress in section 336 provided a flexible section that would accomplish either or both of these desirable objectives.

Upon analyzing section 336, it is found that the same fundamental defects are there present as were found in section 315. However, the superficial changes made in the new section have resulted in a relatively material increase in the number of reports submitted to the President by the commission and in the number of duty changes proclaimed, subsequently, by the President.

In the seventeen months following the passage of the Act of 1930, thirty-seven reports were handed to the President by the commission, which is but one fewer than the number handed him in the eight years during which section 315 was in effect. Such increased results can be accounted for in part by the facility gained by the commission in the administration of section 315. In part, also, it has been due, no doubt, to the fact that certain of the vague parts of the earlier section have been clarified in section 336. For example, the points to which transportation costs are to be taken have been specified. Also, permission to use invoice prices as evidence of foreign costs of production under certain circumstances has given legislative approval to the Attorney General's earlier opinion on this point. Finally, the fact that the Tariff Commission now has the power to recommend rate changes to the President, who must either accept or reject them as they come to him, has tended to shorten the time between presidential receipt of the commission's reports and subsequent proclamations embodying the commission's recommendations.

Of the thirty-seven reports handed the President up to the end of November, 1931, he has proclaimed duty increases as recommended by the commission in five cases and duty decreases in eleven cases. In seventeen cases, he has agreed to the commission's finding that no duty changes were necessary. In the remaining four cases, two provided for decreases in part and no change for the rest; one, for an increase in part and no change in the rest; and one, for a decrease in part, an increase in part, and no change for the remainder.⁷

In spite of the changes made in section 336 and the subsequent, relative increase in the number of presidential proclamations flowing from the section, the same underlying weaknesses con-

⁷ *Fifteenth Annual Report of the U. S. Tariff Commission, 1931*, pp. 91-96.

tinue to prevail. Section 336 has neither taken the tariff out of politics nor has it made for a scientific tariff.

Section 330 of the 1930 Act, dealing with the organization of the Tariff Commission, continues that body as bi-partisan in make-up in the same manner as had previously been provided. The reports continue to be sent to the President, who, while he no longer has the power to proclaim any change other than the one recommended by the commission, continues to hold the balance of power.

Section 336 continues to provide that duty changes shall be made to effect equalization in domestic and foreign costs of production, although a more expanded definition of the term "costs of production" is to be found in the new section. However, the commission is again given, in effect, a blanket authority when it is allowed to consider "other relevant factors that constitute an advantage or disadvantage in competition" for both the foreign and the domestic products being investigated.

Therefore, the conclusion is inevitable that section 336 has not provided the United States with a tariff-making arrangement that is free from politics or is scientific.

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